Brad

Field J.

Submitted

~~Post~~

March 25. 1874

Rev^d on ground that there was no seisure of the property.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. ~~261.~~ 32

AUGUSTUS C. WATSON, PLAINTIFF IN ERROR,

VS.

WALTER E. BONDURANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 21, 1872.

Oct 9 1874

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1 THE UNITED STATES OF AMERICA:

United States circuit court, fifth circuit and district of Louisiana.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON.
No. 6078.

Petition.—Filed Feb'y 8, 1870.

To the honorable the judge of the United States circuit court for the fifth circuit and district of Louisiana:

The petition of Walter E. Bondurant, who is a citizen of the State of Mississippi, with respect, represents:

That your petitioner is the true and lawful owner of a certain tract of land, situate in the parish of Tensas, in this State of Louisiana, (being lot number seven, township eleven, range twelve east, in the district of lands north of Red River, as per certificate number one hundred and fifty-two of the register of the land-office for said district,) containing about one hundred and sixty-five and eleven-hundredths acres.

That this petitioner, as the only heir of his father, William 2 Bondurant, deceased, who was the son and heir of the late Daniel M. Bondurant, was entitled to one undivided fourth part of the estate, real and personal, of petitioner's said grandfather, the late Daniel M. Bondurant, of said parish, of which estate the above-mentioned land forms a part.

That, on the twelfth day of October, eighteen hundred and fifty-two, Albert Bondurant, John Bondurant, and Horace Bondurant, the three brothers and the coheirs with petitioner's father, the said William Bondurant, deceased, obtained an order from the proper court of the said parish for a sale of all the property of the succession of their late father, the said Daniel M. Bondurant, deceased, in order to effect a partition of the said property between your petitioner, then a minor, and his said uncles, will appear by a duly certified copy of the said judgment and decree hereto annexed for reference, and marked "A,"; that, in pursuance of said decree, the said property was duly advertised and sold, and the said Albert, John, and Horace Bondurant became 3 the purchasers of all of said property of the succession of their father, the said Daniel M. Bondurant, deceased, including the undivided fourth part belonging to your petitioner as his share (representing his deceased father) of the said property of said succession of D. M. Bondurant, for the sum of one hundred and forty-eight thousand four hundred and seventy-four dollars, one-fourth of which price became due this petitioner, to wit, the sum of thirty-seven thousand one hundred and eighteen dollars and fifty cents.

That, according to the terms of said sale as fixed by the court, petitioner being a minor, his said share of $37,118.50 was made due and exigible on the fifth day of March, eighteen hundred and sixty-two, at or about which time petitioner would arrive at the age of majority; that, according to the terms of said sale, a mortgage was retained in favor of the minor, this petitioner, on all of said property so sold, of which the tract of land hereinbefore mentioned forms a part, in order to secure the payment to petitioner the amount due him as coheir with his 4 said uncles and co-owner of said property, principal and *and* interest, according to the terms of said decree and the terms of adjudication of said succession property. That, by the act evidencing the sale of said property, the said Albert, John, and Horace Bondurant bound themselves in solido for the sum due petitioner, and by the said act bound themselves not to alienate, deterio'ate, nor encumber said property to the prejudice of petitioner's mortgage in said deed and act retained; all of which will more fully appear by reference to the duly certified copy of the said deed of the sheriff of the said parish of Tensas hereto annexed, and marked "B," the which was duly recorded in the proper office in said parish.

Petitioner further shows that, in the year 1862, to wit, when the debt due petitioner evidenced by his said mortgage became due, your petitioner was absent from his home in the State of Mississippi, and absent also from the State of Louisiana, and that there prevailed a civil war throughout the United States; that there was no officiating officer of the
law in said parish, and that there was no person authorized to
5 *to* record or to re-inscribe mortgages nor performing the duties of
recorder of mortgages, and that the books and records of said parish had been removed from their proper location and office and carried out of the parish, and, petitioner believes, out of the State of Louisiana into the State of Mississippi, where they remained until after peace was declared and civil order was restored, to wit, about the month of June, eighteen hundred and sixty-five; and, as soon as possible thereafter, on petitioners revisiting said parish, to wit, on the eighth day of September, 1865, he caused the said act containing the said mortgage to be re-inscribed in the proper office according to law.

Petitioner shows that he was by "vis major" prevented from re-inscribing his said mortgage previous to that date, and that it was impossible to have re-inscribed the same at an earlier date, or at any time during the years 1862, 1863, 1864, and until the latter part of the year 1865.

That, on the 30th day of January, 1866, your petitioner in-
6 stituted an action against his said uncles, Albert, John, and
Horace Bondurant, for the recovery of the amount of his said mortgage, principal and interest, and obtained a judgment against them, the defendants, in said suit, decreeing that the said mortgage be made executory, and that the said mortgage property, including the said lot herein claimed, be sold to pay and satisfy the same.

That the said lot of land and other lands in said mortgage named and described were seized and sold after due process of law, and that your petitioner became the purchaser of said lot of land herein described and claimed, as well as of all the other lands covered by his said mortgage, as will more fully appear by the deed of sale of the sheriff of the parish of Tensas hereto annexed for reference and proof, and marked "C."

Now, petitioner further shows that one Augustus C. Watson, who
resides in said parish of Tensas, and State of Louisiana, and who
7 is a citizen of said State, has taken possession of and holds the
said lot of land hereinbefore described and claimed, and refuses to allow your petitioner to take possession of the same, claiming illegally and asserting himself to be owner of the same, to the great damage of your petitioner.

That said defendant, Watson, has wrongfully detained said property from the time that your petitioner became the purchaser thereof at sheriff's sale, to wit, since the first day of February, eighteen hundred and sixty-eight, and refuses to give possession to petitioner, although amicable requested so to do.

That, said defendant has much injured the said property by cutting and carrying off the valuable timber growing thereon, and has thereby damaged petitioner to the extent of twelve hundred dollars.

And, by the illegal detention and wrongful use of the said land, defendant has caused to petitioner the loss of rent of the same, to wit:
the sum of nine hundred and ninety and $\frac{66}{100}$ dollars, being at
8 the rate four hundred and ninety-five and $\frac{83}{100}$ dollars per annum.

Wherefore petitioner prays that said defendant, Augustus C. Watson, be cited to answer this demand within the legal delay; and, due proceedings being had, that your petitioner have judgment against said Watson, decreeing petitioner to be the true and lawful owner of the lot of land herein claimed, and condemning said defendant to pay to petitioner the sum of two thousand one hundred and ninety and $\frac{66}{100}$ dollars, with legal interest from judicial demand, with costs, and for general relief.

(Singed) SAM'L R. & C. L. WALKER,
Of Counsel for Petitioner.

Citation and marshal's return.

The President of the United States of America, to the marshal of the district of Louisiana, greeting:

W. E. BONDURANT
vs. } No. 6078.
AUGUSTUS C. WATSON.

9 You are hereby commanded to summon Augustus C. Watson,
a citizen of the State of Louisiana, to comply with the demand of Walter E. Bondurant, a citizen of the State of Mississippi, contained in the petition of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and, that you make due return hereof on the first Monday of March, 1870.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 8 day of February, A. D. one thousand eight hundred and seventy, and
of the Independence of the United States of America, the 94th
10 year.

[SEAL.] (Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received Feb. 9th, 1870, by the U. S. marshal, and returned not served, not having been able to find the defendant named herein in this city.

N. O., March 5th, 1872.
(Signed) F. A. WOOLFLY,
D'y U. S. Marshal.

Alias citation.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

W. E. BONDURANT }
vs. } No. 6078.
AUGUSTUS C. WATSON. }

You are hereby commanded, as you have heretofore been, to summons Augustus C. Watson, a citizen of the State of Louisiana, to comply with the demand of Walter E. Bondurant, a citizen of the State of Mississippi, contained in the petition of *of* which a copy accom-
11 panies this alias citation, or to deliver his answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of May, 1870.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 24th day of March, A. D. one thousand eight hundred and seventy, and of the Independence of the United States of America, the 94th year.

[SEAL.] (Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Clerk.*

Marshal's return.

12 Received Mar. 24, 1870, by the U. S. marshal, and, on the 18th day April, 1870, served a copy of the within citation and accompanying petition on the within-named Aug. C. Watson, by delivering the same to him in person, at the town of St. Joseph, parish of Tensas, La., distant 350 miles from the city of New Orleans.

St. Joseph, La., April 18th, 1870.
(Signed) JAMES S. MATTHEWS,
Special D'y U. S. Marshal.

Answer and pleas.—Filed June 3rd, 1870.

W. E. BONDURANT }
vs. } Circuit court. No. 6070.
AUGUSTUS C. WATSON, }

In this case the defendant, Augustus E. Watson, comes and for answer to plaintiff's petition says that he denies generally and specially each and every allegation in plaintiff's petition contained, except what is herein specially admitted.

This defendant denies the pretended heirship of the plaintiff, as alleged, and that he was a creditor of said Albert, John, and Horace Bondurant, as alleged, and avers that the property belonging to the succession of Daniel M. Boudurant, dec'd, consisted principally of slaves, being one hundred and fifty-four in number, and that three-
13 fourths of the said supposed sum of $37,118.50, consisted in the price of slaves, which, by the laws and constitution of the State

of Louisiana, where said succession was opened and where the said plaintiff has had and still holds his residence, domicil, and citizenship, are invalid as a consideration.

And this defendant, further answering, says that said supposed judgment, (relied upon by said plaintiff,) against said John, Albert, and Horace Bondurant, is, as to this defendant, res inter alios acto, and not in any manner binding upon this defendant, and that the same was rendered without any defence on the part of the said Albert, John, and Horace Bondurant; and said pretended demand upon which the same was based was absolutely null and void, because it resulted from the sale of, and consisted in the price of, persons, as it respected the largest portion thereof, and because said demand was barred against said Albert, John, and Horace Bondurant by the prescription of four,
14 five, and ten years, and was in other respects illegal, informal, and void.

And this defendant, further answering, says that, on or about the thirteenth day of November, A. D. 1854, he acquired, by title translative of property, from John Bondurant and wife, a tract of land containing about one hundred and sixty acres, now in his possession, in said parish of Tensas, but he denies that it is covered by the said pretended titles of said plaintiff, and avers that said John Bondurant had previously acquired the absolute and sole ownership of said land by partition between himself and said Albert and Horace Bondurant.

This defendant, further answering, says that he has been in the open, peaceable, undisturbed, and uninterrupted possession of said tract of land herein described, in his possession, since his said purchase of the same in 1854, as owner, and that, having paid the full value of said property in good faith, he is entitled to be maintained in possession thereof against said plaintiff and all persons whatsoever.

15 This defendant, further answering, says that the said pretended sale of said tract of land by the sheriff, on the said day of is absolutely null and void so far as this defendant was concerned; because, in addition to a want of right, no service of process or notice of seizure or sale were in any manner made upon or given to this defendant; and no sufficient description of the property intended to be sold was given, either in the pretended levy or notice thereof; and said proceedings are irregular, illegal and informal; and because the said sheriff did not seize nor take into his possession the said tract of land in the possession of and claimed by this defendant, but the same was and has remained in the absolute and undisturbed possession of this defendant since his said purchase of said land in November, A. D. 1854, to the present time.

This defendant, further answering, says that the said pretended mortgage was not only ineffectual and void and extinguished by reason of the want and failure of a sufficient original contract and con-
16 sideration to support the same, but also by the defect of and for the want of inscription and timely re-inscription in the mortgage records in the proper parish within the ten years from the date of the said pretended act creating the same; and that said pretended mortgage ceased to have any force and effect as such for want of re-inscription in the mortgage records, and is barred by said prescription.

Wherefor' this defendant prays that plaintiff's demand be rejected, and for costs.

(Signed) By RACE, FOSTER AND E. T. MERRICK,
Att'ys for Def't.

Amended answer.—Filed June 4th, 1870.

W. E. Bondurant *vs.* **Augustus C. Watson.** } Circuit court. No. 6078.

In this case, leave of the court being first had and obtained, this defendant comes and amends his answer by ; that act of sale from said
John Bondurant and wife to this defendant on the 30th day of
17 November, A. D. 1854, was passed before Reeve Lewis, recorder
of said parish of Tensas and State of Louisiana, and was for
165 acres and 11 hundre'ths of an acre, all of which is more particu'a'lly described in said act of sale, a duly certified copy of which is hereunto annexed and made a part of the answer in this case.

Wherefor' this defendant prays as in his original answer contained.

(Signed) By RACE, FOSTER AND E. T. MERRICK,

Order.

Let this amended answer and act be filed.

June 4th, 1870.

(Signed) W. B. WOODS, *J'dge.*

Act annexed to amended answer & filed June 4, 1870.

United States of America:

State of Louisiana, Parish of Tensas:

Before me, Reeve Lewis, recorder in and for the parish of Tensas,
duly commissioned and sworn, and in presence of the witnesses
18 hereinafter named and undersigned, personally appeared John
Bondurant, a resident citizen of the said parish of Tensas, who,
declared and said to me, , recorder, that, for and in consideration of the sum and price hereinafter mentioned and expressed, he has this day bargained, sold, transferred, conveyed, and delivered, and by these present' does hereby bargain, sell, transfer, and deliver unto and in favor of Augustus C. Watson, also a resident citizen of this parish, here present, accepting this act and releasing me, recorder, from all liability on account of the non-production of the certificate of mortgages *ac*quired by article 3328 of the civil code of Louisiana, all the following mentioned and described land, to wit: The lot number seven, in township eleven, of range twelve east, in the district of lands subject to sale at Ouachita, Louisiana, containing one hundred and sixty-five acres and eleven hundredths of an acre, as per certificate No. 152.
Now the price and consideration of said sale is declared by the parties
to be the sum of five thousand seven hundred and seventy-five
19 dollars, ($5,775.00,) paid and to be paid as follows, to wit: The
sum of two thousand eight hundred and eight'-seven $\frac{50}{100}$ dollars
cash, the receipt whereof is hereby acknowledged, and the balance, ($2,887.50,) is evidenced by the draft of said A. C. Watson, on Beck and Ricks, merchants, of New Orleans, and accepted by said Beck & Ricks, due and payable on the first day of January, A. D. 1856, with eight per cent. per annum interest thereon from date till paid; said draft bearing even date herewith; and, after having been paraphed "Ne varietur" by me, recorder, to identify it with this act, was handed to said vendor, who hereby acknowleges receipt thereof: To have and to hold the said

land unto the said purchaser, his heirs and assigns, to their proper use and behoof forever.

And the said vendor, for himself and his heirs, shall and will warrant and forever defend the said land against the legal claim or claims of all and every person or persons whomsoever, by these presents; and the said vendor hereby moreover subrogates said purchaser to all his rights and actions of warranty against his own, and all previous vendors of said land, to exercise said rights and actions in the same manner
20 as he himself might have done.

And next, personally appeared Mistress Mary Jane Montgomery, wife of the said John Bondurant, who, after the undersigned recorder had explained to her verbally the nature and purport of the foregoing act of son, from her said husband to the said A. C. Watson she declared that she was desirous of releasing in favor of the said A. C. Watson, the land hereinbefore sold from the matrimonial, dotal, paraphernal, and other rights, and from all claims, mortgages or privileges to which she may be entitled, whether by virtue of her marriage with the said John Bondurant or otherwise; whereupon the undersigned recorder did explain verbally to the said Mrs. Bondurant, out of the presence of her said husband, the nature and extent of her rights, which are here detailed, to wit, the wife has a legal mortgage on the property of her husband, in the following cases: First. For the restitution of her dowry, and for the re-investment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the celebration of marriage. Second. For the restitution and re-investment of the dotal property which came to her after the mar-
21 riage, either by succession or donation, from the day the succession was opened, or the donation perfected. Third. For the reimbursing the amount of her paraphernal property alienated by her, and received by her husband, or otherwise disposed of for his individual interest Fourth. To indemnify her for debts which she may have contracted with her husband. And, fifth. For the donations which may have been made to her by her husband on account of their marriage; and that by renouncing said rights on the land herein before sold, would deprive herself irrevocably of all incomes thereon. And the said Mrs. Mary Jane Bondurant did, thereupon, declare to me, recorder, that she fully understood the nature and extent of her said rights on the property of her said husband, and that she nevertheless did persist in her intention of renouncing the same in favor of the said A. C. Watson in the land hereinbefore sold.

And the said John Bondurant, being now present assisting and authorizing her in the execution of these presents, and consenting thereto, the said Mrs. Mary Jane Bondurant did again declare that she
22 did and does hereby make a formal renunciation and relinquishment of all her said rights and mortgages on the land hereinbefore sold, in favor of the said A. C. Watson, binding herself and her heirs at all times to sustain and acknowledge the validity of this renunciation.

This done and passed at my office, in the parish of Tensas, in the presence of Attos F. Brown, and Julias Aroni, competent witnesses, of lawful age, and domicilliated in said parish, who hereunto sign their names together with the parties and me, said recorder, this 30th day of

November, in the year of our Lord one thousand eight hundred and fifty-four.

(Signed) JOHN BONDURANT.
(Signed) MARY BONDURANT.
(Signed) A. C. WATSON.

Attest:
A. F. BROWN.
JULIUS ARONI.

(Signed) REEVE LEWIS,
Recorder.

I, Thomas W. Castleman, recorder in and for said parish and State, duly commissioned and qualified, do hereby certify the above and foregoing to be a true and correct copy of the original act now on file and of record in my office.

Witness my hand and seal of office this 10th day of May, A. D. 1870.
[SEAL.] (Signed) THOMAS W. CASTLEMAN.
23 *Recorder.*

Recorded in notarial book "D," page 435.
(Signed) Attest: R. LEWIS,
Recorder.

[5-ct. I. R. S. affixed & cancelled.]

Document A.—Filed for plaintiff, Nov. 11th, 1870.

Tensas district court, October term, 1852.

JOHN & HORACE BONDURANT
vs. No. 534.
ALBERT BONDURANT, ET AL.

By reason of the verdict of the jury rendered in this case, the law therein being in accordance with the prayer of the plaintiffs, it is therefor' ordered, adjudged, and decreed that the partition be made of the property described in the petition, and list thereof filed; that said property be sold, according to law, at public auction, to the highest bidder, in block, for one-fourth part of the price, on a credit, until the minor, Walter E. Bondurant, become of age, to bear seven per cent. interest, which is to be paid annually, and secured by mortgage of the property sold, and for the other three-fourths thereof, cash, and the proceeds divided equally—of this latter between John, Horace, and Albert Bondurant; that an inventory and appraisement of said property be made previous to the sale.

24 Read and signed in open court, this 12th day of October, 1852.
[SEAL.] (Signed) JOHN PERKINS, JR.,
Judge 10th D. C.

A true copy of original on file in this office.
Attest:
(Signed) A. H. CARR,
Deputy Clerk.
(Signed) E. H. DURELL, *Judge.*

Document B.—Filed Nov. 11*th*, 1870.

THE STATE OF LOUISIANA,
Parish of Tensas District Court:

Deed.—Sheriff of Tensas to Albert, John, and Horace Bondurant of D. M. Bondurant.

Be it remembered, by virtue of an order of sale from the above honorable court to me directed, commanding me, the sheriff of the parish of Tensas, to sell at public auction, upon the terms hereinafter to be expressed, the property hereinafter mentioned and described, for the purpose of *a*ffecting a partition of the same in pursuan*t* of a decree of par-
tition rendered by sai*l* hon*e*rable court, on the 12th day of Octo-
25 ber, 1852, between John and Horace Bondurant, plaintiffs, and
Albert Bondurant, personally, and as tutor of the minor, Walter
Ernest Bondurant, defendants, I, G. W. Williams, sheriff of the said parish of Tensas, did, on the 22nd day of Oct., 1852, advertise for sale to take place on the premises, in block, on Saturday, the 4th day of December, 1852, the following described property in this parish, to wit:

The Pleasant View plantation, being a certain tract of land situated
on the Mississippi River, opposite Brunsburg, being the same conveyed
to D. M. Bondurant by Dunlap & Green, containing six hundred and
seventy-three acres, (673;) also, a tract of land adjoining the above-men-
tioned tract, on the upper side, fronting on the Mississippi River, being
the same conveyed to the said D. M. Bondurant by the heirs of Nailor,
containing two hundred and seven (207) acres; also, lot No. 960 of sec-
tion 39, of township 12, of range 13 east, containing one hundred and
forty-eight $\frac{67}{100}$ acres; also, No. 122 lot, No. 6 of section, of township 11,
range 13 east, containing one hundred and ten $\frac{10}{100}$ acres; also, No. 151
tract $\frac{1}{4}$, No. 12 & 4 of section No. 2, of township No. 11, range 12
26 east, containing three hundred and eleven $\frac{18}{100}$ acres; also, No.
152 lot, No. 7 section, township No. 11, range No. 12 *last*, east
containing one hundred and sixty-four $\frac{11}{100}$ acres; also, lot No. 27, No.
166 of section, township No. 12, range No. 13 east, containing one
hundred and sixty-four $\frac{28}{100}$ acres; also, lot 1047, or fractional section
No. 38, township No. 12, of range No. 13 east, containing one hundred
and sixty $\frac{68}{100}$ acres, be the same more or less, and containing in all
twenty-two hundred and thirty-nine acres. Also, the following named
slaves attached to and employed on said plantation, viz: Cely Williams,
74 years; Aaron Henderson, 38; Lydia Oxford, 30; Lucy Sample, 12;
Angenette Williams, 23; Lemuel Speen, 2; Harriett, 4 months; Simon,
28 years; Eliza Coursay, 31; Margarett, 31; Isai'h, 14; Beana, 12;
Horace, 10; John, 8; Osina, 6; Phœbe, 4; Sarah, 30; John Sample, 38;
Lizy, 5; Virginia, 1; John Lern 31; Mary, 31; Lanna, 9; Deliah Lewis,
8; Dennis, 5; Frances, 5 months; Patsy Temple, 51; Julia, 17; Wil-
liam Jackson, 56; Celia, 38; Jeffina, 18; Ann, 10; Aaron, 9; Ena, 6;
Elizabeth, 3; Ezikiah, 33; Edy, 36; Peter Hodergs, 35; Fanny, 11;
Horatio, 7; Adam Hardy, 29; Pleasant, 26; Montgomery, 2, Stephen Da-
vis, 33; Mary 31; Marthem, 13; Rachael Davis, 6; William Thomas 28;
Julia Ann, 25; Milly, 7; Elizabeth, 5; Perry, 3; Salva, 4 months;
27 Sally Wise, 36; Wat. Barns, 41; Eve, 31; Rebecca, 7; Isa'c 7;
Robert, 2; Louisa, 13; Mary Mituck, 30; Charlotte Glover, 19;
Dasm, 3 months; Martha Thomas, 15 years; Spencer, 30; Julia Shorte,
30; Richard, 10; Joe Ducker, 34; Mary Liggins, 33; Danis, 18;
Rachael, 17; Magan, 16; Cuty Crom, 45; Gabreal Woods, 40; Kuty

Woods, 40; Luanda, 18; Caroline, 17; Washington, 18; Missouri, 4 months; Malinda Morgan, 48 years; Eliza Ann, 22; Bratilda, 20; Sandy, 18; John Bland, 15; Sampson, 16; Handal, 14; Armfield, 9; Emanuel, 6; Absalem Cross, 50; May, 34; Thomas, 14; Cornebury, 9; Jona, 6; Solomon, 4; Kiziah, 5 months; Whitney, 31 years; Jim Cortin, 36; Rouela, 33; Lewis McKenny, 24; Frank, 18; Jim Peel, 36; Rhoda, 76; Kendad Pannel, 36; Nelly, 31; infant, two days, Spha; Harris, 8 years; Joe Mallady, 39; Hanah, 30; Amanda, 11; Armstead, 2; Jim Lewis, 32; Owen Smith, 34; Henry Clay, 28; Harriet, 27; Henry Thomas, 32; Henry Umple, 28; Matilda, 27; Henrietta, 29; Sam Jackson, 31; Ann Jackson, 39; Ben Taylor, 22; Geo. Thomas, 32; Julia, 28; Lucretia, 10; Jane, 3; Cabeb, 4 months; Samuel Coffer, 26 years; Georgeana, 32; Eliza, 28; Martha Bruce, 34; Thorneton Shote, 8; Nolet Wise, 32; Hester Henderson, 28; Sylvia, 11; Wilson Granten, 36; Patsay, 33; Lemon Granten, 5; Nancy Deen, 31; Miles, 9; Emeline Rice, 51; Walken, 30; Grey, 28; Harrison H., 29; Daphi-
28 ney, 23; George, 9; Ralph, 4; Gusy, 6; Almetta, 2; Miney
H., 22; Charles, 5; Perry Thomas, 33; Adeline Pernud, 14; David, 46; also, 47 mules, six horses and mares, 15 yoke of six oxen, 55 head of stock cattle, 30 ploughs, on' set of carpenter's tools, and set blacksmith's tools, 60 weeding-hoes, 20 axes, &c., and all other farming utensils upon and belonging to said plantation; also, all the cotton and caine hanging by the roots; and eighty head of hogs, and all other stock belonging or appertaining to said plantation.

To be sold on the following terms, viz: One-fourth part of the price bid, on a credit until the 5th day of March, 1862, the time when the minor, Walter E. Bondurant, arrives at the age of majority, bearing seven per cent. per annum interest; the interest payable annually, with a mortgage retained on the property sold; the other three-fourths of the price bid for cash on the day of sale. Said advertisements were made by posting written notices, in English, at Water Proof, Hard Times, and the court-house door in St. Joseph, the three most public places in the parish. On said 4th day of December, 1852, I repaired to the Pleasant View plantation, and, having read the order of sale and adver-
29 tisement, I received written instructions from the said Albert,
John, and Horace Bondurant, which are hereunto annexed and made part of this deed, requiring me to sell their undivided interest, being three-fourths of said property, upon the same terms and conditions prescribed in behalf of said minor, Walter E. Bondurant, and having offered said property at public sale, between the hour of twelve and 3 o'clock p. m., the said Albert, John, and Horace Bondurant bid for the same the sume of one hundred and forty-eight thousand four hundred and seventy-four dollars, ($148,474,) which, being the last and highest bid, and being the appraised value of said property, I struck off and publicly adjudicated said property to the said Albert, John, and Horace Bondurant at and for the price aforesaid.

And the said Albert, John, and Horace Bondurant, being dispensed by law, as purchasers aforesaid, from any payment in compliance with the terms of sale prescribed as aforesaid, for their said proportions of said price, being three-fourths thereof, for the remaining fourth of said
30 price belonging to said minor, Walter E. Bondurant, a special
mortgage is hereby retained upon said property to secure the full and punctual payment thereof. And the said Albert, John, and Horace Bondurant hereby bind themselves not to alienate, deterio'ate or encumber said property to the prejudice of said mortgage.

And, at the request of said parties, in order to make this an authentic act for all purposes, the same is signed by the said Albert, John, and Horace Bondurant, and James W. Davenport, under tutor of said minor, before Robert S. Skinner, notary, in presence of Thomas P. Farrar, Reeve Lewis, and John H. Armat, compitent witnesses, who with said notary and me, said sheriff, have signed this act this 4th day of December, A. D. 1872.

(Signed) GEO. W. WILLIAMS, *Sheriff.*
(Signed) ALBERT A. BONDURANT.
(Signed) JOHN BONDURANT.
(Signed) HORACE BONDURANT.
(Signed) J. W. DAVENPORT, *Under Tutor.*

Attest:
THOMAS P. FARRAR.
JOHN A. ARMAT.
REEVE LEWIS.

(Signed) ROBERT S. SKINNER,
Recorder & Ex-officio Not. Pub.

STATE OF LOUISIANA,
Parish of Tensas:

31 I certify that the above and foregoing is a true and correct copy of the original act now on file and of record, December 6th, 1852, and re-inscribed this 8th day of September, 1865.

Witness my hand and seal of office, this 18th day of February, A. D. 1870.

[SEAL.] (Signed) THOMAS W. COSELMAN,
Reco'der.
By R. ALBERT JUGE,
Dep'y Recorder.

Document C.—Filed Nov. 11th, 1870.

THE STATE OF LOUISIANA, *Parish of Tensas:*

WALTER E. BONDURANT
vs. } 13 district court. 1242.
ALBERT BONDURANT.

Deed. Sheriff of Tensas to Walter E. Bondurant.

Be it known and remembered that, by virtue of the above-styled writ of fi. fa. to me directed, upon the above-named honorable court, I, George W. W. Williams, sheriff of said parish of Tensas, did, on the 25th
32 of December, A. D. 1867, sieze the following described property of the defendants in this parish, to wit:

The Pleasant View plantation, being a certain tract of land situated on the Mississippi River opposite Bruinsburg, and being the same conveyed to D. M. Bondurant by Dunlap and Green, and containing six hundred and seventy-three (673) acres; also, a tract adjoining the above mentioned tract on the upper side and fronting on the Mississippi River, being the same conveyed to D. M. Bondurant by heirs of Nailor, and containing two hundred and seven (207) acres; also, No. 960, of section No. 39, of township 12, range 13 east, containing one hundred and forty-eight $\frac{67}{100}$ acres; also, No. 122 of lot, No. 6 of section , township 11, range 13, containing one hundre dand ten $\frac{10}{100}$ acres; also 151, fractional quarters No. 12 & 4, of section No. 2, of township 11, range 12 east, containing three hundred and eleven $\frac{18}{100}$ acres; also, No. 152 lot, No. 7 section, township eleven, range 12 east, containing one hundred and sixty $\frac{11}{100}$

acres; also, lot No. 27, No. 166 of section , township 12, range 13 east,
containing one hundred and sixty-four $\frac{28}{100}$ acres; also, lot No. 1047 of
fractional section No. 38, township 12, range 13 east, containing
33 one hundred and sixty-eight one hundredths acres, containing
in all twenty-two hundred and thirty-nine acres.

On the 28th day of December, A. D. 1867, I advertised said property for sale, to take place at the court-house door, on Saturday, the first day of February, A. D. 1868, for cash. Said advertisement was made by publication in the "Tensas Parish Gazette," a weekly newspaper published in this parish for more than thirty clear days prior to said day of sale.

On said 1st day of February A. D. 1868, I repaired to said place of sale, and, within the hours by law prescribed, having read the writ, advertisement, certificate of mortgage and appraisement, I offered said property for sale, when Walter E. Bondurant bid the sum of four thousand four hundred and seventy-eight dollars therefor, which being the last and highest bid, and two-thirds of the appraised value thereof, I struck off and public*a*lly adjudicated the same to him.

Wherefor', by virtue of the premises, I have bargained, sold, and
34 delivered, and by these presents do bargain, sell, and deliver unto
the said Walter E. Bondurant, the property as fully and completely as I, said sheriff, could or ought to do.

In testimony whereof I have hereunto set my hand officially in presence of L. F. Smith and Thomas Majors, competent witnesses, this 1st day of February, A. D. 1868.

G. W. WILLIAMS,
Sheriff.

Attest:
THOMAS MAJORS.
LEONARD F. SMITH.

Recorded February 14th, A. D. 1868.
(Signed) THO'S. W. CASTLEMAN,
Recorder.

STATE OF LOUISIANA, *Parish of Tensas:*

I, A. H. Carr, deputy-clerk, hereby certify that the above and foregoing is a true and correct cop*p*y of the original deed on file in this office.

[SEAL.] (Signed) A· H. CARR, *Dep't. Clerk.*
(Signed) E. H. DURELL, *Judge.*

"B."—Copy of deed.—Filed Nov. 26th, 1870.

THE STATE OF LOUISIANA,
Parish of Tensas, Tenth District Court:

Succession of D. M. Bondurant.

35 Be it remembered, by virtue of an order of sale from the above
honorable court, to me directed, commanding me, the sheriff of the parish of Tensas, to sell at public auction upon the terms hereinafter to be expressed, the property hereinafter mentioned and described for the purpose of effecting a partition of the same in pursuance of a decree of partition rendered by said hon'l court on the 12th day of October, 1852, between John and Horace Bondurant, plaintiffs, and Albert Bondurant, personally, and as tutor of the minor, Walter Ernest Bondurant, defendants.

I, G. W. Williams, sheriff of said parish of Tensas, did, on the 22d day of Oct., 1852, advertised for sale, to take place on the premises, in block, on Saturday, the 4th day of December, 1852, the following described property in this parish, to wit:

The Pleasant View plantation, being a certain tract of land situated
on the Mississippi River opposite Bruinsburg, being the same conveyed
to D. M. Bondurant by Dunlap & Green, containing six hundred and
seventy-three acres, (673;) also, a certain tract of land adjoining the
above mentioned tract on the upper side fronting on the Mississippi
36 River, being the same conveyed to the said D. M. Bondurant
by the heirs of Nailor, containing two hundred and seven
acres, (207;) also, lot No. 960, of section 39, of township 12, of range 13
east, containing one and forty-eight $\frac{67}{100}$ acres; also, No. 122, lot No. 6
of section, of township 11, range 13 east, containing one hundred and
ten $\frac{10}{100}$ acres; also, No. 151 tract, $\frac{1}{4}$ Nos. 1, 2, and 4, of section No. 2, of
township No. 11, range No. 12 east, containing three hundred and eleven
$\frac{18}{100}$ acres; also, No. 152 lot, No. 7 section, township No. 11, range No. 12
east, containing one hundred and sixty-four $\frac{11}{100}$ acres; also, lot 27, No.
166 of section, township No. 12, range No. 13 east, containing one hundred
and sixty-four $\frac{28}{100}$ acres; also, lot 1047, or fractional section No.
38, township No. 12, of range No. 13 east, containing one hundred and
sixty $\frac{68}{100}$ acres, be the same more or less, and containing in all twenty-two
hundred and thirty-nine acres; also, the following named slaves
attached to and employed on said plantation, viz:

Cely Williams, 74 years; Anna Henderson, 38 years; Lydia Oxford,
30; Lucy Sample, 12; Angenett Williams, 23; Awena Speer, 2; Harriett,
4; Martha Simon, 28 years; Elija Coursey, 31; Margarett,
37 31; Isiah, 14; Precilla, 12; Horace, 10; John, 8; Orena, 6;
Phœba, 4; Sarah, 30; John Sample, 38; Levy, 5; Virginia, 1;
John Lewis, 31; Mary, 31; Leanna, 9; Deliah Lewis, 8; Dennis, 5;
Frances, 5 months; Patsey Temple, 51 years; Julia, 17; William Jackson,
56; Celia, 38; Jefferser, 18; Edy, 36; Peter Hodges, 33; Fanny, 11;
Horatio, 7; Adam Handy, 29; Pleasant, 26; Montgomery, 2; Stephen
Davis, 33; Mary, 31; Mathew, 13; Rachael Davis, 6; William Thomas,
28; Julia Ann, 25; Mettey, 7; Elizabeth, 5; Perry, 3; Salva, 4 months;
Surly Win, 36; Nat Barns, 41; Eve, 31; Rebecca, 7; Isaac, 7; Robert,
2; Louisa, 13; Mary Kentuck, 30; Charlott Glover, 19; Dann, 3 months;
Mariah Thomas, 15 years; Spence, 30; Julia Shote, 30; Richard, 10;
Joe Ducker, 34; Milly Legins, 33; Davis, 18; Richard, 17; Major, 16;
Caly Conn, 45; Gabriel Woods, 40; Kelly Woods, 40; Lucinda, 18;
Caroline, 17; Washington, 18; Missouri, 4 months; Malinda Morgan,
48 years; Elza Ann, 22; Matilda, 20; Sandy, 18; John (Bland,) 15;
Sampson, 16; Hambal, 14; Armfield, 9; Emanuel, 6; Abolom Crop,
50; Veney, 34; Thomas, 14; Cornelius Tona, 6; Solomon, 4; Kezeah,
5 months; Jim Whiting, 31 years; Jim Cotton, 36; Rosetta, 33; Lewis
McKenny, 24 years; Frank, 18; Jim Bell, 36; Rhoda, 76; Kendall
38 Purnell, 36; Nelly, 31; Infant, 2 days; Sophia Harris, 8
years; Joe Mallandy, 39; Han'ah, 30; Amanda Armstead, 2;
Jim Lewis, 32; Owen Smith, 34; Henry Clay, 28; Harrett, 27; Milly
Thomas, 82; Henry Temple, 28; Matilda, 27; Henrietta, 9; Sam Jackson,
31; Ann Jackson, 39; Ben Taylor, 22; Geo Thomas, 32; Julia, 28;
Lucenta, 10; Jane, 3; Caleb, 4 months; Sarah Coffer, 26 years; Georgeana,
32; Eliza, 28; Martha Bruce, 34; Thornton Shote, 8; Violet
Wise, 32; Herter Henderson, 28; Sylvia, 11; Wilson Granton, 36;
Patsey, 33; Lemon Granton, 5; Nancy Dean, 30; Miles, 9; Emaline
Rice, 51; Walker, 30; Guy, 28; Hamton H., 29; Dapuy, 23; Ralph, 4;
Gey, 6; Almetto, 2; Mellsy H., 22; Charles, 5; Perry Thomas, 33;

Adaline Purnell, 14; David, 46; also, 47 mules, 6 horses and mares,
15 yoke oxen, 55 head of stock-cattle, 30 ploughs, one set of carpenter's
tools, one set blacksmith tools, 60 weeding-hoes, 20 axes, &c., and all
other farming utensils upon or belonging to said plantation; also, all
the cotton and corn hanging by the roots, and eighty head of hogs and
all other stock belonging or appertaining to said plantation; to be sold
on the following terms, viz: One fourth part of the price bid on
39 a credit until the 5th day of March, 1862, the time when the minor,
Walter E. Bondurant, arrives at the age of majority, bearing
seven per cent. per annum interest, the interest payable annually, with
a mortgage retained on the property sold, the other three-fourths of the
price bid for cash on the day of sale.

Said advertisement was made by posting written notices, in English, at Water-Proof, Hard Times, and the court-house door in St. Joseph, the three most public places in this parish.

On said 4th day of December, 1852, I repaired to the Pleasant View
plantation, and, having read the order of sale and advertis'ment, I received
written instructions from the said Albert, John, and Horace Bondurant,
which are hereto annexed and made part of this deed, requiring
me to sell their undivided interest, being three-fourths of said property,
upon the same terms and conditions prescribed on behalf of said minor,
Walter E. Bondurant; and, having offered said property at public sale
between the hours of 12 and 3 o'clock p. m., the said Albert, John, and
Horace Bondurant, bid for the same the sum of one hundred and forty-eight
thousand four hundred and seventy-four dollars, (148,474.00,)
40 which, being the last and highest bid, and being the appraised
value of said property, I struck off and publicly adjudicated said
property to the said Albert, John, and Horace Bondurant, at and for
the price aforesaid.

And the said Albert, John, and Horace Bondurant, being dispensed by law, as purchasers aforesaid, from any payments in compliance with the terms of sale prescribed as aforesaid for their said proportions of said price (being three-fourths thereof) for the remaining fourth of said price belonging to said minor, Walter E. Bondurant, a special mortgage is hereby retained upon said property to secure the full and punctual payment thereof.

And the said Albert, John, and Horace Bondurant, hereby bind themselves not to alienate, deteriorate, or encumber said property to the prejudice of this mortgage.

And, at the request of said parties, in order to make this an authentic
act for all purposes, the same is signed by the said Albert, John, and
Horace Bondurant, and James W. Devenport, under tutor of said minor,
before Robert Y. Skinner, notary, in presence of T. P. Farrar, Reeve
Lewis, and John H. Armat, competent witnesses, who, with said
41 notary and me, said sheriff, have signed this act this 4th day of
December, A. D. 1852.

GEO. W. WILLIAMS, *Sheriff.*
ALBERT BONDURANT.
HORACE BONDURANT.
J. W. DEVENPORT,
Under Tutor.

Attest:
THO'S P. FARRAR.
JOHN H. ARMAT.
REEVE LEWIS.
(Signed)

ROB'T Y. SKINNER,
Recorder & Ex-officio Not. Pub.

Endorsements.

Filed for record in my office 6th December, 1852, for registry in conveyance and mortgage record.
(Signed) ROBLY Y. SKINNER, *Recorder*.

Duly recorded in notarial record-book "C," page 433 to 436, and in mortgage record-book "A," page 821 to 824.

Witness my hand and seal this 6th day December, A. D. 1852.
[SEAL.] (Signed) ROB'T Y. SKINNER,
Recorder.

Filed December 6th, 1852.
F. L. GLOVER, *Clerk*.
By W. H. GARRDSON, *D'y-Clerk*.

STATE OF LOUISIANA,
Parish of Tensas, *10th Dist. Court*:

42 I, F. L. Glover, clerk of said court, hereby certify the within sheriff's deed to Albert, John, and Horace Bondurant, to be duly recorded in my office, in book of sheriff's deeds, at pages 106, 107, 108, and 109. Recorded December 6th, 1852.

Witness my hand and the seal of said court this 6th day of Dec'r, 1852.
[SEAL.] (Signed) F. L. GLOVER, *Clerk*.

Re-inscribed September 8th, A. D. 1865, in mortgage record-book "C" pages 367, 368, and 370.
(Signed) THOMAS W. CASTLEMAN,
Recorder.

THE STATE OF LOUISIANA,
Parish of Tensas:

I, Thomas W. Castleman, recorder in and for said parish and State, duly commissioned and qualified, do hereby certify the above and foregoing to be a true and correct copy of the original act now on file and of record in my office.

Witness my hand and seal of office this 18th day of November, A. D. 1870.
[SEAL.] (Signed) THO'S W. CASTLEMAN,
Recorder.
(Signed) E. H. DURELL, *Judge*.

43 *Rule.—Extract from minutes Nov. 26th*, 1870.

U. S. circuit court.

NEW ORLEANS, *Saturday*, *Nov. 26th*, 1870.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

W. E. BONDURANT
vs. } No. 6078.
AUG. C. WATSON.

On motion of Sam'l R. and C. L. Walker, counsel for plaintiff, and on showing to the court that the depositions of the following-named witnesses for the plaintiff, viz, Leonard and Reeves, F. M. Baker, Geo. W. Williams, W. E. Bondurant, Tho's W. Castleman, Geo. I. Dicks, Mrs. E. Bondurant, T. C. Pollock, and S. D. Stockman, taken under commissions from this honorable court, have been returned and placed on file herein:

It is ordered that defendant show cause, if any he have or can, on Friday, the 2 day of Dec'r, at 11 o'clock a. m., why the said depositions of said witnesses should not be read in evidence on the trial of this cause, and that defendant's counsel be duly notified thereof.

Marshal's return.

43 Received Nov. 26th, 1870, by the U. S. marshal, and, on the 28th day same month and year served a copy of the within rule on defendant herein *herein*, through Race, Foster and E. T. Merrick, his attorneys, by delivering the same to Geo. W. Race, one of said att'ys, in person.

New Orleans, Nov. 28th, 1870.
(Signed) S. W. REED,
D'y U. S. Marshal.

Rule.—Extract from minutes Nov. 30th, 1870.

W. E. BONDURANT
vs. No. 6078.
A. E. WATSON.

On motion of Race, Foster and E. T. Merrick, of counsel for the def't, and, on suggesting to the court that the def't has placed on file the depositions of the following named witnesses, v'z, Ja's T. Gillepsie, Reeve Lewis, esq., Tho's P. Clinton, Rob't Murdock, Jno. Henry, A. C. Watson, Geo. W. Williams, and Eli Tullis:

It is ordered that the pl'ff show cause, on the second day of Dec'r next, at 11 a. m., why the said deposition shall not be used as evidence in the cause; and, in the event said pl'ff, on the trial of this rule, shall fail to urge any objections he may have to the regularity
45 of the taking of said depositions, all such objections shall be considered as waived.

Service accepted.

Order: Rules made absolute.—Extract from minutes Dec. 2d, 1870.

W. E. BONDURANT
vs. No. 6078.
A. C. WATSON.

The rule taken by pl'ff on 26th ult'o, and that taken by def't on 30th ult'o, were called up—S. R. and C. L. Walker for pl'ff; Race Foster and E. T. Merrick for def't—and, no objection being made, it is ordered that both rules be made absolute, and said depositions admitted in evidence on the trial of the cause, the right being reserved to the parties to move to strike out such answers of the witnesses as may be irresponsive to the interrogatorries.

Waiver of jury.—Filed Feb. 20th, 1871.

W. E. Bondurant
vs.
Augustus C. Watson.

46 In this case it is agreed to wa've the jury, take testimony out of court, and submit the case on brief, with objections to be reserved to testimony, and a request to the court to find the facts specially.

(Signed) SAM'L R. & C. L. WALKER,
Att's for Plaintiff.
(Signed) RACE, FOSTER AND E. T. MERRICK,
Att's for Def't.

From the minutes.—Order on motion to submit case, Feb. 20th, 1871.

W. E. Bondurant
vs. No. 6078.
A. C. Watson.

This cause called for trial by the court, the counsel having filed a stipulation waiving the jury—S. R. & C. L. Walker for pl'ff; Race, Foster & E. T. Merrick for def'ts—when the parties agreed to take their evidence in the clerk's office, and thereupon submit the cause for decision.

Judgment December 2d, 1871.—*From the minutes November term,* 1871.

New Orleans, *Saturday, December 2d,* 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

W. E. Bondurant
vs. No. 6078.
Augustus C. Watson.

47 For the reasons orally assigned by the court:

It is ordered, adjudged, and decreed that there be judgment in favor of the petitioner, Walter E. Bondurant, and against the defendant, Augustus C. Watson, decreeing the petitioner to be the true and lawful owner of a certain tract of land wrongfully detained by the defendant, situate in the parish of Tensas, Louisiana, being lot No. 7, township 11, range 12 east, in the district of lands north of Red River, as per certificate No. 152, of the register of the land-office for said district, containing about $165\frac{11}{100}$ acres.

It is further ordered that it be referred to Commissioner Cohen, to ascertain and report on the damages sustained by the petitioner in consequence of the unlawful detention and use of his property by defendant.

The erasure of four lines.—Approved.—A. A. Woolfley, *Clerk.*

(Erased:) [Judgment rendered December 2d, 1871.
Judgment signed February 14th, 1872.
(Signed) E. H. DURELL, *Judge.*]

Statement of facts by the court.—Filed Dec. 2d, 1871.

U. S. circuit court.

W. E. BONDURANT
vs. } No. 6078.
48 A. C. WATSON.

Statement of facts found by the court.

The court finds the following facts:

1. That the plaintiff was eaqual heir with his three uncles, John, Albert, and Horace Bondurant, of all the property of the succession of D. M. Bondurant, deceased, late of the parish of Tensas in Louisiana.

2. That a partition was made by licitation between the other heirs and the minor, W. E. Bondurant, plaintiff in this suit, under a decree rendered by the district court of the parish of Tensas, on the 12th day of October, 1852, in the suit for partition entitled John and Horace Bondurant vs. Albert Bondurant, tutor, &c., No. 534 on the docket of said court, as appears by document marked "A," and made part hereof, and identified by the court and filed in this case on the 11th day of November, 1870, by F. B. Vinot, deputy clerk of this court, no other portion of said record being in evidence, except said document.

3. That, on the 4th day of December, A. D. 1852, at the probate sale under said decree of the property of the succession of D. M. Bondurant, the three uncles, Albert, John, and Horace Bondurant, became 49 the purchasers of the whole property for the sum of one hundred and forty-eight thousand four hundred and seventy-four dollars, the one-fourth of which price being the amount due the minor, the plaintiff in this suit, was made payable on the 5th of March, 1862, the date at which the said minor would become of age, with interest thereon at the rate of seven per cent. per annum, secured by mortgage containing the clause de non alienando, and the sheriff's deed, which was made a notarial act before the recorder of the parish of Tensas, on the 4th day of December, 1852, was duly recorded on the 6th day of December, 1852, and re-inscribed on the 8th day of September, 1865, as shown by the document marked "B," filed in this suit on the 26th day of November, 1870, by F. B. Vinot, deputy clerk of this court. Said document, with the certificates of the recorder of mortgages thereon, is made part hereof, and is found to be executed as it purports.

4. The court further finds that the tract of land in dispute was part of the lands belonging to the succession of D. M. Bondurant, and embraced in the said partition sale to Albert, John, and Horace Bondurant, and included in and subject to the said mortgage in favor of the 50 minor, as shown by said document "B."

5. The court finds that in the suit entitled W. E. Bondurant vs. Albert Bondurant et als., No. 1242, in the 13th judicial district court for the parish of Tensas, a final judgment was rendered in favor of the plaintiff, and against Albert, John, and Horace Bondurant, for the sum of thirty seven thousand one hundred and eighteen dollars and fifty cents, (37,118.50,) with interest from the 4th of December, 1862, at the rate of seven per cent. per annum, subject to a credit of $5,018 of date 22d of March, 1854, and decreeing that the mortgage of the plaintiff be made executory on the lands therein described, of which the tract of land in dispute is a part, as appears by the document marked "D," filed in this

suit by F. B. Vinot, deputy clerk of this court, and identified by the court and made part hereof for greater certainty.

6th. That, in pursuance of the said judgment and decrree, a writ of execution issued to, and a sale made by the sheriff of the parish of Tensas; that said lands were seized and adjudicated at public sale by said sheriff to said W. E. Bondurant, plaintiff, as appears by the
51 said document and endorsements and certificates thereon, marked "E. H. D.," filed in this suit by F. B. Vinot, deputy clerk of this court, and identified by the court, and made part hereof.

7th. That the said sheriff of the parish of Tensas, on the first day of February, 1868, executed a deed for the lands so sold, including the tract in dispute to the said Walter E. Bondurant, which deed was duly recorded in the recorder's office, in the said parish of Tensas, on the 14th day of February, 1868, as appears by document "C," and the recorder's certificate therein, and which was filed in this court by F. B. Vinot, deputy clerk, on the 16th of November, 1870, and is identified by the court and made part hereof, and the court holds that it is proved that the said Walter E. Bondurant took possession and holds possession of all lands thus sold, except the tract in dispute, which the defendant, Watson, refused to deliver.

8th. The court further finds that John Bondurant was present at the place of sale on the day of sale; that he had read the advertisement of the property in the newspaper, and that he had also read the advertisements on the day of sale posted on the court-house door, as ap-
52 pears by the evidence of the plaintiff, taken by consent of counsel in the clerk's office, being document marked "M," filed in this suit on the 10th of March, 1871, by F. B. Vinot, deputy clerk of this court, and made part hereof.

9th. That, on the 13th of November, A. D. 1854, said John Bondurant sold the tract of land in dispute to Augustus C. Watson, the defendant in this suit, and in said act of sale, said Watson waived the production of the certificate of mortgage required by law as appears from document "K K," entitled "John Bondurant and wife to A. C. Watson;" "Deed;" filed in this suit March 10th, 1871, by F. B. Vinot, deputy clerk, identified by the court and made part hereof.

10th. The court finds that the defendant has had possession of the land in dispute since his purchase of the same from John Bondurant, and has refused to deliver the said land to the plaintiff, W. E. Bondurant.

11. The court finds that the plaintiff reached the age of majority on the 5th day of March, 1862, and that the proof establishes his heirship as alleged in his petition.

53 12. The court finds that, during the late war, the books of records of the parish recorder were removed by him from the court-house of said parish, about the 1st of June, 1862, (see Baker's [recorder] testimony, marked P,) and first taken to a plantation belonging to the estate of J. C. Daniels, about nine miles from the town of St. Joseph, the parish seat, and from thence they were removed into the State of Mississippi, to the residence of Francis Griffin, Claiborn County, in said State, across the Mississippi River, about a mile and a half from the town of St. Joseph, where they remained until the year 1865, and the places of deposit were kept secret from the public.

13. The court further finds that the mortgage of the plaintiff was reinscribed on the 8th day of September, 1865.

14. The court further finds that there were no districts courts held in said parish of Tensas from the month of November, 1861, until November, 1865.

15th. That, by an act under private signature, the tract of land in controversy in this case was set off to John Bondurant, with other
54 land and slaves, Dec. 12th, 1853, but the act of division was not re-
corded in the parish of Tensas until 29th April, A. D. 1856, and that the tract of land in controversy was separated and distant from three-fourths to one mile from the Bondurant plantation by intervening lands owned by other persons, and that it adjoins the plantation of the defendant, Watson.

16. That, on the thirtieth day of November, A. D. 1854, said John Bondurant, as sole owner, sold the tract of land in dispute by title translative of property to the defendant, Aug. C. Watson, for $5,775.00, by notarial act passed before Reeve Lewis, parish recorder of the said parish of Tensas, and the said act was recorded in the recorder's office of said parish the same day. Mary Bondurant, the wife of John Bondurant, renounced her tacit mortgage in the same act, and Watson, in the said act, waived the certificate of mortgages. The court finds said act of sale last-mentioned was executed and recorded as shown by document "K K" indorsed ("Off'd by def't, March 10th, 1871, D. Urban, clerk U. S. circuit court,") and the same is made part hereof. That, after the execution of said act of sale, Watson enclosed about
55 fifty acres of the said tract of land with a fence, for a pasture;
that he incorporated about six acres more into the cultivated fields of his plantation, and the same is still under fence with his other land.

17. That the sheriff of the parish of Tensas, G. W. Williams, executed the deed marked "C" (filed in this case on the 11th day of November, 1870, by F. B. Vinot, d'y clerk,) and the same was recorded in the notarial records of the parish recorder, and by the clerk in his office, on the 14th of February, 1868. Said document "C," with the certificates thereon, is made a part of this finding of the facts.

18. That the defendant, Aug. C. Watson, has been in possession of the tract of land in dispute, to wit, lot No. 7, in township 11, range No. 12 east, north of Red River, Louisiana, ever since his purchase, on the 30th day of November, A. D. 1854, and has since said last-mentioned day been in the actual, public, peaceable, and uninterrupted possession of the said land in dispute up to the present time, with the exception of the service of citation in this case on the 18th day of April, 1870, and the prosecution of this suit; that said Watson had, prior to the institution of this suit, cleared a small portion (six or seven acres)
56 of said lot No. 7, and had the same inclosed in a field, with his
other lands adjoining thereto, and the same formed a portion of the arable lands of defendant's plantation; that another portion had, shortly after the purchase by said Watson, been inclosed, with other lands of said Watson, for a pasture, and that said Watson has cut wood upon said tract of land, for the use of his plantation, from the time of his purchase until the present time.

That, after the issuing of said writ of execution, or fieri facias, on the 9th day of December, A. D. 1867, the sheriff of said parish of Tensas did not take into his possession the tract of land in dispute, under the said writ of execution, nor in any manner interrupt or disturb the possession of said Watson.

The only notice given of the seizure under the said fieri facias to any one was a notice addressed to the defendants, Albert Bondurant, John Bondurant, and Horace Bondurant, posted on the court-house door of the parish of Tensas, they being absent. But, on the day of the sale, John Bondurant read the notice of sale in the newspaper, and conversed with the plaintiff respecting said sale, and was present at the sale.

57 The plaintiff arrived at the age of majority the 5th day of March, 1862, as stated in the petition in this case, and the proof establishes his heirship, as alleged in his petition.

Both plaintiff and defendant were in the confederate lines during the late war, and both were, during a portion of the time, in the confederate service.

The plaintiff, while in Virginia, in October, A. D. 1862, requested his mother to have the mortgage in his favor re-inscribed. On her arrival in Vicksburg, Miss., on the 10th of October, A. D. 1862, being told that the records of Tensas Parish were removed from St. Joseph and secreted, she made no further effort to have the mortgage re-inscribed. She was personally present in the said parish of Tensas in October, A. D. 1862, and no person applied to the recorder of the parish of Tensas to re-inscribe said special mortgage in favor of the plaintiff during the period of the war, viz, in 1861, 1862, 1863, 1864, and until the 8th day of September, 1865, on which said last-mentioned day, the said mortgage was for the first time re-inscribed upon the mortgage record.

58 The court finds that the slaves sold at the partition sale, and bought with the land, amounted in value to $74,237, one-half of the $148,474.00, the price bid by said Albert, John, and Horace Bondurant, for the whole, on the 22d day of October, A. D. 1852, and that during the month of June, 1865, the loyal civil gover'ment of the State was extended over the whole State of Louisiana.

(Signed) E. H. DURELL, *Judge.*

Bill of exceptions of def't.—Filed Dec. 2d, 1871.

U. S. circuit court.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON.
No. 6078.

Be it remembered that, on the trial of this case, it having been proven by the testimony of Reeve Lewis, esq., then acting as superintendant of the sheriff's office, in said parish of Tensas, and by the testimony of the sheriff of said parish himself, that there was no actual seizure of the property in dispute in possession of defendant, under said execution, issued in said case of W. E. Bondurant vs. Albert Bondurant et al., No. 1242 of the 13th district court for the said parish of Tensas, a copy of which said execution is made a part hereof, and marked E. H. D.; and also it being proven by the testimony of 59 Thomas P. Clinton, esq., a member of the bar, that, at the time said execution (E. H. D.) was in the hands of the sheriff, it was not customary in the parish of Tensas to make actual seizures of real estates under executions; and the testimony of said witnesses being uncontradicted, and the defendant having, by counsel, requested the court among others, to adopt the following ruling, viz, "That, in order to make a valid sale of tangible property on execution in all the parishes of the State of Louisiana, except the parish' of Orleans and Jefferson, there must be an actual seizure of such property by the sheriff under the execution," for the decision of the cause, and the court having refused to adopt said ruling, but, on the contrary, having held that there being a part de non alienando in the act of sale to Albert, John, and Horace Bondurant, as shown by document B, made a part hereof, the defendant could not question the regularity of the proceedings, and the

endorsement on said execution and document (E. H. D.) was sufficient, without any actual seizure, as against defendant to divest title: And the court thereupon, under such construction of the law, finding specially that said property and land in dispute was seized as
60 stated in said special finding, the defendant then and there excepted to the refusal of said court to rule as hereinabove requested, and then and there excepted to the actual ruling made as herein aforesaid, and then and there excepted to the finding as a fact that said unsigned indorsement on said execution (E. H. D.) was a seizure of said property under execution, and could have any legal effect against this defendant, unaccompanied as it was by any actual seizure of the property, and tendered to the court this his bill of exception for signature and allowance. And as said document E. H. D. and B are certified with other bills as part thereof, it is directed that they and documents C, D, and K K be copied but once in the record, and stand as a part of each bill of exception as well as a part of the special finding by the court.

(Signed) E. H. DURELL, *Judge*. [SEAL.]

(This reference approved.) *Approved:
(Signed) SAM'L R. & C. L. WALKER.*

Execution E. H. D.

STATE OF LOUISIANA,
Parish of Tensas:

Thirteenth district court.

W. E. BONDURANT
vs. } No. 1242.
ALBERT BONDURANT.

61 The State of Louisiana and said court to the sheriff of the parish of Tensas, greeting:

We command you that, by seizure and sale of the property, real and personal, rights and credits of Albert Bondurant, Horace Bondurant, and John Bondurant, and especially the following lands, to wit: The Pleasant View plantation, being certain tract of land situated on the Mississippi River, opposite Bru'nsburg, and being the same conveyed to D. M. Bondurant by Dunlap and Green, and contained six hundred and seventy-three acres, (673;) also, a tract adjoining the above-mentioned tract on the upper side, fronting on the Miss. River, being same conveyed to said D. M. Bondurant, by heirs of Nailor, containing 207 acres; also, No. 9 lot, of sec. 39, of T. 12, of R. 13 east, containing $148\frac{67}{100}$ acres; also, No. 122 of lot, 6 of sec., of T. 11, R. 13, containing $110\frac{10}{100}$ acres; also, No. 15 tract, $\frac{1}{4}$ Nos. 1, 2, & 4, of sec. No. 2, of T. 11, R. 12 east, $111\frac{18}{100}$ acres; also, No. 152 lot, No. 7 sec., T. No. 11, R. 12 east, containing $160\frac{11}{100}$ acres; also, lot 27, No. 166 of sec. , T. No. 12, R. 13 east, containing $164\frac{28}{100}$ acres; also, lot No. 1047 on fractional section No. 38, T. 12, R. No. 13 east, containing one hundred and sixty $\frac{68}{100}$ acres, be the same more or less, and containing in all twenty-
62 two hundred and thirty-nine acres of the said parish of Tensas, in the manner prescribed by law, you cause to be made the sum of thirty-seven thousand one hundred and eighteen dollars and fifty

cents, debt, with interest thereon at the rate of seven per centum per aunum until paid, from 4th of December, A. D. 1862, subject to a credit of five thousand and eighteen $\frac{16}{100}$ dollars, to date March 22d, A. D. 1854, and also the sum of forty-three dollars ten cents, costs of suit, as well as the costs of this writ, and the service thereof, to satisfy a judgment rendered in our said district court, on the fourteenth day of November, A. D. 1867, in favor of the said W. E. Bondurant, and against the said Albert Bondurant et al., as aforesaid.

And how you shall have executed this writ make return in seventy days. Herein fail not.

Witness the honorable E. D. Farrar, judge of said court, and the seal thereof, this 9th day of December, one thousand eight hundred and sixty-nine.

[SEAL.] (Signed) FRANK M. BAKER,
Clerk of said Court.

Received the 9th December, 1867, and served this writ as follows, to wit: I seized, on the 25th day of December, A. D. 1867, the
63 following-described property belonging to def'ts, to wit, the Pleasant View plantation, containing 673 acres; also, a tract adjoining the above-mentioned tract on the upper side, and being the same conveyed to D. M. Bondurant, by heirs of Nailor, containing 207 acres; also, No. 9 lot, of section 39, T. 12, R. 13 east, containing 148$\frac{67}{100}$ acres; also, 122 of lot No. 6 of sect. , of T. 11, R. 13, containing 110$\frac{10}{100}$ acres; 311$\frac{18}{100}$ acres, in T. 11, R. 12 east; 160$\frac{11}{100}$ acres; in same township and range; 164$\frac{28}{100}$ acres in township 12, range 13; 160$\frac{8}{100}$ acres in same township and range, containing in all 2,239 acres. Served notice of seizure on the same day of making seizure by posting the same at the court-house door, the def'ts being now residents of the State.

On the 28th day of December, A. D. 1867, I advertised said property for sale to take place at the court-house door, in this parish, on Saturday, the 1st day of February, A. D. 1868, for cash. Said advertisement was made by publication in the Tensas Parish Gazette, a weekly newspaper published in this parish, for more than thirty days clear prior to said day of sale. On said 1st day of February, A. D. 1868, to said day of sale and within the hours by law prescribed, after having read the writ, advertisement, certificate of mortgage, and apprais'ment,
64 I offered said property for sale, when W. E. Bondurant bid the sum of four thousand four hundred and seventy-eight dollars therefor, which being the last and highest bid and two-thirds of the appraised value thereof, I struck off and publicly adjudicated the same to him; and this writ is intitled to a credit of the amount of said bid.

A true copy. Attest:

CHA'S E. STEELE,
D'y Clerk.

[SEAL.] (Signed) E. H. DURELL, *Judge.*

Document B will be found on the 24th page of this transcript.
Document C will be found on the 31st page of this transcript.

DOCUMENT D.

Thirteenth district court parish of Tensas, State of Louisiana.

WALTER E. BONDURANT
vs.
A'BERT BONDURANT.
} No. 242.

This case coming up for trial, and, after hearing the parties by their counsel, and the law and the evidence being in favor of the 65 plaintiff, Walter E. Bondurant, and against the defendants, Albert Bondurant, John Bondurant, and Horace Bondurant, it is, by reason thereof, ordered, adjudged, and decreed that the plaintiff do have and recover judgment against the defendants, in solido, for the sum of thirty-seven thousand one hundred and eighteen dollars and fifty cents, with interest at the rate of seven per cent. per annum from the 4th day of December, A. D. 1862, until paid, subject to a credit of five thousand and eighteen dollars and sixteen cents, of date March 22d, 1854; and it is further ordered, adjudged, and decreed that the authentic act of mortgage, which is the basis of this action, be, and the same is hereby, rendered executory and ordered to be executed, and the following land therein described, seized, and sold to pay and satisfy said judgment, interest, and all costs, viz, the Pleasant View plantation, being a certain tract of land situated on the Mississippi River, opposite Bruinsburg, and being the same conveyed to D. M. Bondurant by Dunlap and Green, containing six hundred and seventy-three (673) acres; also, a tract adjoining the above-mentioned tract, on the upper side, 66 fronting on the Mississippi River, being the same conveyed to the said D. M. Bondurant by the heirs of Nailor, containing two hundred and seven (207) acres; also, No. 960, of section 39, of township 12, of range 13 east, containing one   and forty-eight $\frac{67}{100}$ acres; also No. 122 lot, No. 6 of section , of township 11, range 13 east, containing one hundred and ten $\frac{10}{100}$ acres; also, No. 151 tract, ¼ No. 1, 2, & 4 of section No. 2, of township No. 11, range No. 12 east, containing three hundred and eleven $\frac{18}{100}$ acres; also, No. 152 lot, No. 7 section, township No. 11, range 12 east, containing one hundred and sixty $\frac{11}{100}$ ares; also, lot 27, No. 166 of section, township No. 12, range No. 13 east, containing one hundred and sixty-four $\frac{28}{100}$ acres; also, lot 1047 or fractional section No. 38, township No. 12, of range No. 13 east, containing one hundred and sixty $\frac{68}{100}$ acres, be the same more or less, containing in all twenty-two hundred and thirty-nine acres.

Read and signed in open court this 14th day of November, A. D. 1867.

(Signed) E. D. FARRAR,
Judge 13th District.

A true copy. Attest:
[SEAL.] ROBERT WORRELL, *Clerk.*
67 (Signed) E. H. DURELL, *Judge.*

DOCUMENT KK.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Tensas:

Before me, Reeve Lewis, recorder in and for the parish of Tensas, duly commissioned and sworn, and in presence of the witnesses hereinafter named and undersigned, personally appeared John Bondurant, a

resident citizen of the said parish of Tensas, who declared and said to me, recorder, that, for and in consideration of the sum and price hereinafter mentioned and expressed, he has this day bargained, sold, transfer'ed, conveyed, and delivered, and by these presents does hereby bargain, sell, transfer, and deliver unto and in favor of Augustus C. Watson, also a resident citizen of the parish, here present, accepting this act, and releasing me, recorder, from all liability on account of the non-production of the certificate of mortgage required by article 3328 of the civil code of Louisiana, all the following mentioned and described land, to wit: The lot number seven, in township eleven, of range twelve east,
in the district of lands subject to sale at Ou'chita, Louisiana,
68 containing one hundred and sixty-five acres and eleven-hun-
dredths of an acre, as per certificate No. 152. Now, the price and consideration of said sale is declared by the parties to be the sum of five thousand seven hundred and seventy-five dollars, ($5,775.00,) paid and to be paid as follows, to wit: The sum of two thousand eight hundred and eighty-seven $\frac{50}{100}$ dollars cash, the receipt whereof is hereby acknowledged, and the balance ($2,887.50) is evidenced by the draft of said A. C. Watson on Beck and Ricks, merchants of New Orleans, and accepted by said Beck & Ricks, due and payable on the first day of January, A. D. 1856, with eight per cent. per annum interest thereon from date till paid, said draft bearing even date herewith; and, after having been paraphed "Ne varietur" by me, recorder, to identify it with this act, was handed to said vendor, who hereby acknowledges receipt thereof: To have and to hold the said land unto the said purchaser, his heirs, assigns, to their proper use and behoof, forever. And the said vendor, for himself and his heirs, shall and will warrant and forever defend the said land against the legal claim or claims of
all and every person or persons whomsoever by these presents.
69 And the said vendor hereby moreover subrogates said purchaser
to all his rights and actions of warrant against his own and all previous vendors of said land, to exercise said rights and actions in the same manner as he himself might have done.

And next personally appeared Mistress Mary Jane Montgomery, wife of the said John Bondurant, who, after the undersigned recorder had explained to her verbally the nature and purport of the foregoing act of sale from her said husband to the said A. C. Watson, she declared that she was desirous of releasing, in favor of the said A. C. Watson, the land hereinbefore sold from the matrimonial, dotal, paraphernal, and other rights, and from all claims, mortgage, or privileges to which she may be entitled, whether by virtue of her marriage with the said John Bondurant or otherwise.

Whereupon the undersigned recorder did explain verbally to the said Mrs. Bondurant, out of the presence of her said husband, the nature and extent of her rights, which are here detailed, to wit: The wife has
a legal mortgage on the property of her husband in the following
70 cause: First. For the restitution of her dowry, and for the re-
investment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the celebration of the marriage. Second. For the restitution and re-investment of the dotal property which came to her after the marriage, either by succession or donation, from the day the succession was opened or the donation perfected. Third. For the re-imbursement the amount of her paraphernal property alienated by her and received by her husband, or otherwise disposed of for his individual interest. Fourth. To indemnify her for debts which she may have contracted with her husband; and fifth. For the dona-

tions which may have been made to her by her husband on account of their marriage; and that, by renouncing said rights on the land hereinbefore sold, would deprive herself irrevocably of all recourse thereon.

And the said Mrs. Mary Bondurant did thereupon declare to me, recorder, that she fully understood the nature and extent of her said rights on the property of her said husband, and that she, nevertheless, did persist in her intention of renouncing the same in favor of
71 the said A. C. Watson on the land hereinbefore sold.

And the said John Boudurant being now present, assisting and authorizing her in the execution of these presents, and consenting thereto, the said Mrs. Mary Jane Bondurant did again declare that she did, and does hereby, make a formal renunciation and relinquishment of all her said rights and mortgages on the land hereinbefore sold in favor of the said A. C. Watson, binding herself and her heirs, at all times, to sustain and acknowledge the validity of this renunciation.

Thus done and passed at my office in the parish of Tensas, in presence of Atlas F. Brown and Julius Aroni, competent witnesses, of lawful age, and domiciliated in said parish, who hereunto sign their names, together with the parties and me, said recorder, this 30th day of November, in the year of our Lord one thousand eight hundred and fifty-four.

JOHN BONDURANT.
MARY BONDURANT.
A. C. WATSON.

Attest:
A. F. BROWN.
JULIUS ARONI.
(Signed) REEVE LEWIS, *Recorder.*

THE STATE OF LOUISIANA,
Parish of Tensas:

72 I, Thomas W. Castleman, recorder in and for said parish and State, duly commissioned and qualified, do hereby certify the above and foregoing to be a true and correct copy of the original act, now on file and recorded in my office, in notarial record-book D, on page 435, 436, and 437, under date November 30th, 1854.

Witness my hand and seal of office this 25th day of February, A. D. 1871.

[SEAL.] (Signed) THO'S W. CASTLEMAN,
Recorder.
(Signed) E. H. DURELL, *Judge.*

Bill of exception of def't.—Filed Dec. 2d, 1871.

U. S. circuit court.

W. E. BONDURANT
vs.
A. C. WATSON.
} No. 6078.

Be it remembered that, on the trial of this cause, it having been proven, by the testimony of Reeve Lewis, esq., clerk of the police jury of Tensas, that the parish officers of the parish of Tensas were mostly at their posts during the war; that F. M. Baker, the parish recorder, "was at his office as recorder nearly all the time during the war, and

had the control of the records up to the time he was appointed
73 the clerk of the court, which was either in the latter part of 1864
or b'ginning of 1865," and that he, the witness, knew "that, if any party had applied to the recorder to record a deed in the latter part of 1862, or beginning of 1863, it would have been done;" and it also being testified to and proven by Atlas F. Brown, a witness for defendant, that he knew Mr. Baker, the recorder of the parish of Tensas, very well "he (the recorder) was about St. Joseph during the war; that he did not keep his office open every day, but he was about there; that witness did not think there would be the slightest difficulty during the war for getting his (said recorder's) indorsement on a deed or mortgage 'filed for registry,' if it had been presented to him." It being also proven by the recorder (Baker) that, about the 1st of June, 1862, in pursuance of an order of the police jury of said parish, he, as recorder of said parish, had removed the books and papers belonging to the recorder's office from their usual place to a place which he considered to be safe; said place was about nine miles from St. Joseph; they (the records) were
not accessible to the public during that term; the authorities of
74 the parish ordered the removal to a place privately selected by
him because it was commonly reported that the Federal forces were destroying such records as they had the opportunity, and it was thought best, as a matter of public safety, to remove the records to a secrat place, that they might be preserved unharmed;" they were first taken to the plantation belonging to the estate of S. C. Daniels; they remained there as long as he thought they were safe, and then he (said recorder) had them removed from there to Mr. Frank Griffin's residence in Mississippi, in Claiborn Co., where they remained until 1865, and then returned to St. Joseph; that the removeals were made in the day-time, but kept secret from the public, although there were a number of parties who knew where he (said recorder) had removed them; that it was well known that they were removed, and the recorder says he would not have told any and every body where they were secreted, but any one who would not have misused the knowledge to the prejudice of the safety of the records, he would have told where they were, and did, in fact, tell some parties where they were; that there was no disposition
on the recorder's part to prejudice the rights of any one;
75 that he was disposed to render every facility to protect their
rights that was in his power; that said recorder went out to the said Daniel's place while the books and papers were there, and took one book of the notarial record out of the box, and carried it to his house, for the purpose of making some copies of deeds, and he kept said book in his house secreted in the bottom of a large trunk until the books and
were returned from Mississippi; and, in answer to the question, Did the plaintiff, during the war, ever apply to the parish recorder to re-inscribe any mortgage in said parish of Tensas? proves that no such application was ever made to him during the war by the plaintiff; and, it being also shown by the testimony of Thomas P. Clinton that it was some time during the year 1863 that the records were removed and carried across the Mississippi about 1½ or two miles from St. Joseph; and it being also proven by James M. Gillespie that he lived adjacent to St. Joseph, and was in town nearly every day during the whole war, and that he thought, if application had been made to the recorder to have
any deed recorded, he would have had it recorded; and if any
76 deed had been presented to him at his office, there would have
been no trouble in getting his indorsement thereon that it was filed for registry; that, while the records were in the parish, they were

entirely under the control of the recorder; that they were removed across the river, and that he did not think there were any two or three days together in which he could not have crossed the river; that the records were taken away by the recorder himself; they were carried over the Mississippi when Grant's army was coming down, about April, 1863; and it being also proven by Reeve Lewis that, after crossing the river Mississippi, it was only about ¾ of a mile to Griffin's, and it being further shown by the testimony of the plaintiff and his mother that, while the plaintiff was in Virginia, in October, A. D. 1862, plaintiff requested his mother to have the said mortgage in his favor re-inscribed on her arrival in Vicksburg, Mississippi, on the 10th of October, A. D. 1862; being told the records of Tensas parish were removed from St. Joseph and secreted, she made no further effort to have the mortgage re-inscribed; that she was personally present in the parish of Tensas in October, A. D. 1862; and it also appearing from the testimony 77 that no person applied to the recorder of the parish of Tensas to re-inscribe said special mortgage in favor of the plaintiff during the period of the war, viz, in 1861, 1862, 1863, 1864, and until the 8th day of September, A. D. 1865, on which said last-mentioned day the said mortgage was re-inscribed upon the mortgage-record;

And it also being shown by the testimony of the recorder, Castleman, that a deed was recorded in the notarial records of the recorder's office on the 30th day of December, A. D. 1862, and the next was recorded in the same record, August, 1865; and that a mortgage was recorded in the mortgage-records, April 12th, 1862, and the next is recorded August 21st, 1865;

And it being also proven by the testimony of the defendant, Watson, who was called as a witness by the plaintiff, that, previous and up to the time of the purchase of the tract of land of John Bondurant, he did not know that it belonged to the estate of Bondurant; that he bought of John Bondurant; and that he was not willing to swear that he knew it then; that he supposed it belonged to Gillespi until it was offered to him by John Bondurant;

78 And it being also shown that the loyal gover'ment was extended over all parts of the State of Louisiana in June, 1865:

The defendant, on the trial of the case before the court, requested the same, by counsel, to make the following rulings, among others, viz:

"4. That if it appears that the plaintiff failed to apply to the recorder of mortgages in and for said parish of Tensas to re-inscribe the pretended mortgage set up by him, during the ten years from the date of the first inscription, and it was, then and during all that time, in his power and that of his agents to make such application and in the power of such recorder to re-inscribe the mortgage that then said mortgage ceased to operate against the property of the defendant, Watson, at the end of ten years, and a subsequent re-inscription more than two years after the lapse of said ten years, could not revive the mortgage to the prejudice of defendant's recorded title.

"5. That, under the law of Louisiana, as now settled, the re-inscription of a mortgage is essential to maintain its validity after the lapse of ten years; that it is the duty of the party relying upon such 79 mortgage to apply to the proper officer to have the same re-inscribed; and that such officer, on refusing to re-inscribe, is responsible in damages for such neglect of duty."

But the court refused to adopt either of said rulings, and, instead thereof, ruled that the period of the war of the rebellion was to be deducted from the period prescribed for the re-inscription of mortgages, and making such deduction the re-inscription of the act of mortgage on the 8th day of September, A. D. 1865, was within the ten years. To which opinion of the court in refusing to adopt the rulings herein requested for the decision of the case and to the said opinion and ruling adopted by the court, defendant, by counsel, severally, then and there, excepted, and tendered to the court this his bill of exception for seal, signature, and allowance, which is done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

(This reference approved.) *Approved.
(Signed) SAM'L R. & C. L. WALKER.*

Bill of exception.—Filed Dec'r 2d, 1871.

U. S. circuit court.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON. } No. 6078.

80 Be it remembered that, on the trial of this case, the plaintiff,
having introduced the following, and no other proofs of his title,
viz: Document A, indorsed "filed" in this case, on the 11th day of
November, A. D. 1870, by F. B. Vinot, d'y clerk of this court; Document "B," filed Nov. 26, 1870, by the same clerk; Document C, "filed" by the same clerk, Nov. 11th, 1870; and Document D, being the judgment in the case of W. E. Bondurant vs. Albert Bondurant et al., No. 1242, 13th judicial district court, identified by my signature, and the execution (E. H. D.,) issued in said last-mentioned case, and the indorsement thereon also identified by my signature, and having proven that he was a minor, and the same party named in Document B, in whose favor a mortgage was executed therein; and that he did not arrive at the age of majority until the 5th day of March, 1862; and the defendant having offered in evidence the act of partition or division refer'ed to in special finding of the court; and also the act of sale from John Bondurant to said defendant, Aug. C. Watson, with the indorsements thereon,
marked "K K," offered by defendant, March 10th, 1871, D.
81 Urban, cl'k U. S. circuit court; and, having proven that the only
notice given of the seizure under said execution, marked E. H.
D., to any person, was by posting upon the court-house door a notice of seizure to the said H., A., and J. Bondurant, as absentees; and that there was no actual seizure of the property in dispute; and that that time the sheriff of the parish of Tensas was not in the habit of making actual seizures of property; and that the defendant held said property uninterruptedly and in good faith from the date of his purchase until the commencement of this suit; that he supposed John Bondurant had good title to said lands, and had no knowledge of any proceedings to divest his title until after the day of February, 1868, viz, March, 1869; said Documents A, B, C, D., E. H. D., and "K K," being annexed and ordered to be certified as a part hereof, and there being no other portions of the cases of John and Horace Bondurant vs. Albert Bondurant et al., No. 534, Tensas district court, and Walter E. Bondur-
ant vs. Albert Bondurant et al., No. 1242, in evidence, except said
82 Documents A, D, and E. H. D., on the trial of this case before the
court, the same was requested by defendant's counsel to make
the following rulings, among others, viz:

1st. That it is essential to the validity of the sheriff's return to the writ of execution that it should be signed by him or his deputy; and, inasmuch as the adjudication conveys the title at sheriffs sale, that adjudication must be authenticated by the signature of the sheriff or his deputy.

2nd. That, in order to make valid sale of tangible property in all the parishes of the State of Louisiana, except Orleans and Jefferson, there must be an actual seizure of such property by the sheriff on execution.

3d. That, in order to divest the title of the defendant, notice of seizure upon the Bondurants at least, if not upon him, the defendant, was essential.

Which said several rulings, requested by defendant, the court refused to adopt, and, instead thereof, ruled that, inasmuch as the mortgage retained in the act of sale to said Albert, John, and Horace Bondurant, of date December the 4th, 1852, contained the pact de non alieanando, the said Aug. C. Watson, in the eye of the
83 law, is not to be considered in possession quoad the plaintiff,
and it it does not matter what irregularities were in the sheriff's proceedings in selling the property, Watson, although in actual possession, cannot avail himself of such defects and irregularities. And thereupon said defendant, by counsel, then and there severally excepted to said refusal to rule as requested and to the ruling last mentioned adopted by the court for the decision of the cause, and tenders to the court this his bill of exception for signature and allowance, which is done under seal.

The words "Signed E. H. Durell, judge," approved.
F. A. WOOLFLEY, *Clerk.*

(Signed) E. H. DURELL, *Judge.*

U. S. circuit court.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON.
} No. 6078. Filed Dec. 2d, 1871.

Be it remembered that, on the trial of this case, the plaintiff, in order to cure the want of notice of seizure in the proceedings under the execution issued in the case of Walter E. Bondurant vs. Albert Bondurant et al., copy of which said execution, marked E. H. D., and identified by my signature, is made part hereof, with the unsigned proceedings, indorsed on said execution, offered to read in evi-
84 dence the oral testimony of the plaintiff wherein he stated that
John Bondurant "was present on the day of sale; that he rode to the court-house on the day of sale with John Bondurant; that John Bondurant was aware that the sale was to take place; that John Bondurant read the notice of the sale to plaintiff from the newspaper and read the one posted on the court-house door;" on the ground that parol proof is inadmissible to supply the want of notice of seizure of real property, and that parties cannot be divested of title and possession except in accordance with law made to appear by proper returns by the proper officer. But the court overruled said objection and admitted the testimony, and the defendant then and there *ac*cepted and tendered to the court this his bill of exception for signature and allowance; which is done. Although said testimony, with other testimony, was taken by consent at the clerk's office, it was taken subject to all legal exceptions except as to form of taking.

All of the documents refer'ed to in the bills of exception and a part thereof also identified by my signature.

85 (Signed) E. H. DURELL, *Judge*. [SEAL.]

Approved.
(Signed) SAM'L R. & C. L. WALKER.

Bill of exception of d'f't.

U. S. circuit court.

W. E. BONDURANT
vs. } No. 6078.
AUG. C. WATSON.

Be it remembered that, on the trial this cause, the court in its finding of the facts ruled that the recording of the said mortgage in favor of the plaintiff, on the 5th day of December, A. D. 1852, is equivelent to actual notice in the defendant;" to which said ruling of the court for the decision of the case defendant excepted, and tendered to the court this his bill of exception for seal, signature, and allowance, which is done.

(Signed) E. H. DURELL, *Judge*. [SEAL.]

Approved.
(Signed) SAM'L R. & C. L. WALKER.

Document A	copied on page 23.
Document B	" " " 24.
Document C	" " " 31.
Document D	" " " 64.
Document E. H. D.	" " " 60.
Document K K.	" " " 67.

86 *Rule for a new trial.—Extract from minutes Dec. 6th*, 1871.

W. E. BONDURANT
vs. } No. 6078.
A. E. WATSON.

On motion of Race, Foster and E. T. Merrick, of counsel for defendant, and on suggestion to the court that said defendant feels aggrieved by the judgment rendered against him in this case, and that the same is contrary to law and the evidence—

It is ordered that plaintiff show cause, on 23d December, 1871, at 11 a. m., why a new trial should not be granted and said judgment set aside.

Marshal's return.

Received December seventh, 1871, by the U. S. marshal; and, on same day, month, and year served a copy of within rule on Samuel R. and C. L. Walker, named herein, by handing the same to C. L. Walker in hall of custom-house building.

New Orleans, Dec. 9th, 1871.

(Signed) S. W. REED,
D'y U. S. Marshal.

Hearing and submission.—Extract from minutes Dec. 23d, 1871.

87 W. E. Bondurant
vs.
A. C. Watson. } No. 6078.

The rule for a new trial in this cause came up—S. R. and C. L. Walker, for def't in rule; Race, Foster and E. T. Merrick for pl'ff in rule—when, after hearing counsel the court took time to advise.

Order: Rule denied, a new trial refused.—Extract from minutes, February 10th, 1872.

W. E. Bondurant
vs.
Aug. C. Watson. } No. 6078.

Ordered that the rule taken by defendant on 6th Dec., 1871 be discharged, and that a new trial be refused with costs.

Final judgment, Dec. 2d, 1871, *as signed.*

November term.

New Orleans, *Saturday, December 2d,* 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

W. E. Bondurant
vs
Augustus C. Watson. } No. 6078.

88 For the reasons orally assigned by the court—

It is ordered, adjudged, and decreed that there be judgment in favor of the petitioner, Walter E. Bondurant, and against the defendant, Augustus C. Watson, decreeing the petitioner to be the true and lawful owner of a certain tract of land, wrongfully detained by the defendant, situate in the parish of Tensas, Louisiana, being lot No. 7, township 11, range 12 east, in the district of lands north of Red River, as per certificate No. 152, of the register of the land-office for said district, containing about $165\frac{11}{100}$ acres.

It is further ordered that it be referred to Commissioner Cohen to ascertain and report on the damages sustained by the petitioner, in consequence of the unlawful detention and use of his property by defendant.

Judgment rendered December 2d, 1871.
Judgment signed February 14th, 1872.
(Signed) E. H. DURELL, *Judge.*

Petition for writ of error.—Filed Feb. 17th, 1872.

To the hon. the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

89 The petition of Augustus C. Watson, a citizen of the State of Louisiana, respectfully represents that a judgment has recently been rendered and signed by your hon. court, in the suit of Walter E. Bondurant, a citizen of the State of Mississippi, against your petitioner, Augustus C. Watson, being cause No. 6078, of your hon. court; that

your petitioner feels himself aggrieved by said judgment, and that he desires the allowance of a writ of error therefrom with a superseadeas; and that his bond with security which he tenders, be accepted.

Wherefore petitioner prays that a citation in error may be signed, a writ of error be allowed with a supersedeas of execution; that his bond with security be approved, and for general relief in the premises.

(Signed) By RACE, FOSTER AND E. T. MERRICK,
Att'ys for Petitioner.

Order.

A writ of error to operate as a superseadeas is allowed in this case, as prayed for, and, according to law, returnable to the Supreme Court of the United States, on the first Monday in December next, the 90 petitioner giving bond in the sum of five thousand dollars with good and solvent security, conditioned as the law directs.

New Orleans, February 17th, 1872.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed Feb. 17th, 1872.

Know all men by these presents that we, Augustus C. Watson, of the parish of Tensas, and State of Louisiana, as principal, and John Butts and James H. Ogden, of the city of New Orleans, and State of Louisiana, as sureties, are held and firmly bound unto Walter E. Bondurant, of the State of Mississippi, in the full and just sum of five thousand dollars, to be paid to the said Walter E. Bondurant, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately at a circuit court of the United States, fifth 91 judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein said Walter E. Bondurant is plaintiff, and judgment was rendered against the said Augustus C. Watson, defendant; and the said Augustus C. Watson having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Walter E. Bondurant, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Augustus C. Watson shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) AUGUSTUS C. WATSON.
(Signed) E. T. MERRICK. [L. S.]
(Signed) JOHN F. BUTTS. [L. S.]
(Signed) JAMES H. OGDEN. [L. S.]

Sealed and delivered in the presence of—

Bond approved.
(Signed) E. H. DURELL, *Judge.*

92 *Rule for approval of bond.—Extract from minutes, Feb'y 17th, 1872.*

Walter E. Bondurant *vs.* **Augustus C. Watson.** } No. 6078.

On motion of Race, Foster and E. T. Merrick, of counsel for the defendant, and suggesting to the court that the defendant has applied for a writ of error, with a supersedeas, and tendered his bond, & signed by John F. Butts and James H. Ogden, as surity, from the judgment in the above-entitled case, it is ordered that the plaintiff show cause on Tuesday, the 20th day of February, inst., at 11 a. m., why the said bond tendered by the defendant, should not be accepted and approved, to operate as a supersedeas.

Marshal's return.

Received February 19th, 1872, by the U. S. marshal; and, on same day, month, and year served a copy of within rule on Samuel R. and C. L. Walker, named herein, by handing the same to C. L. Walker, a member of said firm.

New Orleans, February 19th, 1872.
(Signed) S. W. REED,
D'y U. S. Marshal.

93 *Order: Rule continued.—Extract from minutes November term, 1871.*

New Orleans, *Tuesday, February 20th,* 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

W. C. Bondurant, *vs.* **A. C. Watson.** } No. 6078.

By written consent of counsel, the rule returnable this day, is continued till to-morrow at 11 a. m.

Order: Bond for writ of error approved.—Extract from minutes Feb'y 21st, 1872.

W. E. Bondurant *vs.* **A. C. Watson.** } No. 6078.

The rule taken on 17 inst. came up—Race, Foster and E. T. Merrick, for pl'ff in rule; S. R. and C. L. Walker, for def't in rule—when, after hearing the evidence of James H. Ogden, the court considering the surety good and sufficient, the bond tendered by the def't was
94 accepted and approved, to operate as a surpersedeas.

Report of M. M. Cohen, U. S. c'r.—Filed March 22nd, 1872.

Circuit court of the United States, fifth circuit and district of Louisiana.

W. E. BONDURANT *vs.* AUGUSTUS C. WATSON. } No. 6078.

To the hon'ble the judges of the said court:

In pursuance of a decretal order made and entered in this cause, bearing date on the 2d day of December, 1871, at a stated term of this court held in the city of New Orleans, in the said district, by which this cause was referred to me, one of the comm'r's of said court, to ascertain and report on the damages sustained by the petitioner, in consequence of the unlawful detention and use of his property by defendant, I, M. M. Cohen, a commissioner of said court, do respectfully report, that I have proceeded to investigate the matters so referred to me, and that I have carefully examined the record in this case, and, after 95 due consideration, I find—

First. As to damages:

The sheriff's sale under which Bondurant claims, took place on the 1st February, 1868, from which date he claims damages caused by illegal detention and waste. (See Statem't Facts, p. 7.) Suit was instituted 8th February, 1870, and damages claimed to the extent of $2,190.66 and judgment rendered and signed on the 14th February, 1872, for the land. (See petition.)

I find in the testimony of J. M. Gillespie, one of defendant's witnesses, that he says (commission, page 4) there are in the tract four or five acres cleared. (Doc. W., p. 4.)

Reeve Lewis (page 10) says the same. (Document W.)

Eli Tullis (page 22) says about ten acres; Watson, the defendant, says about seven or eight acres; John Henry, def't's overseer, (page 36,) says there are about twelve acres cleared. The average of these several estimates, show that there are about $7\frac{7}{10}$ acres of cleared land cultivated in cotton, of the one hundred and sixty-five acres, the rest being wood land.

The testimony of J. M. Gillespie, taken before Com'r Urban, says:

96 "I think the cleared land would rent for a bale or bale and a half of cotton to five acres per annum."

If we say $80.00 for every five acres, at that rate, the rent for the seven $\frac{7}{10}$ acres, or cleared portion, would be one hundred and twenty-three $\frac{20}{100}$ dollars per annum, for four years; making the total sum for years, four hundred and ninety-two dollars and eighty cents.

As to the cutting of wood, J. M. Gillespie, witness for defendant, says:

"Mr. Watson has been in the habit of cutting from fifty to sixty cords of wood per annum from off the tract of land in dispute, for ginning purposes only;" and in redirect examination, same testimony, says:

"If it" (the plantation) "was rented for purpose of cutting wood, the lessor would receive fifty cents a cord for the wood cut."

If, then, we say fifty-five cords of wood were cut, (according to testimony of Gillespie,) at fifty cents per cord, the sum would be $22.50 for one year; or $90.00 for the four years, by the lowest estimate.

In the testimony of defendant, filed March 10th, 1871, he says:

97 "From February, 1868, to February, 1870, I suppose I have cut from this tract of land, eighty, or one hundred cords of wood."

"I suppose wood like this would sell on the river bank, from one and a half to two dollars per cord."

If we say, an average, according to this last testimony, would be one hundred and eighty cords of wood, cut in four years, and valued at an average of one dollar and seventy-five cents per cord, the amount would be $315.00.

A. F. Brown testifies that plaintiff's plantation would, with this tract of land attached, rent for more than it would without it; and, that in view of the steam arrangements of the plantation and scarcity of wood and rail-timber, it would make a difference of 10 or 12 per cent. in their amount rent. (Doc. H.)

The plaintiff, in his testimony, Document "M," values this land at $6,000; thinks defendant has cut, from the date of plaintiff's purchase of the place to the institution of this suit, six or seven hundred cords of wood; valued the wood at two or three dollars per cord; estimates the rent of the cleared portion of this land at $150.00 per year, and the rent of the wooded land at 500.00 per year, making 650.00 per year for
98 the tract.

As the tract sold for $5,775.00, (see Doc. "K K,") in the year of 1854, and is now estimated as being worth $6,000, the interest on its value at 8 per cent. would be $480.00 per annum, making $1,920.00 for the four years.

It being shown that the rental of the cleared portion of the land is, for the four years, at least $492.80, the loss of interest on the value of the land, viz, $6,000.00, amounts to.............................. $1,920 00
From which we must deduct rent pl'ff would have received,
viz.. 492 80

$1,427 20

And the estimates of the value of the wood cut, varying from $90.00 to $315.00, and $1,200 as waste, we will say an average of $501.00, which, being added to above $1,427.20, will give $1,928.20, which I am of opinion would be a fair estimate of the damages suffered by plaintiff.

Judge Merrick objects to the reference on the ground that there is a writ of error which acts as a supersedeas.

Respectfully submitted,
(Signed) M. M. COHEN, *Comm'r.*
99 (Signed) E. H. DURELL, *Judge.*

Rule.—Extract from minutes, March 23d, 1872. *November term,* 1871.

NEW ORLEANS, *Saturday, March 23d,* 1872.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, presiding judge.

W. E. BONDURANT }
vs. } No. 6078.
A. C. WATSON. }

On motion of Sam'l R. and C. L. Walker, of counsel for pl'ff, ordered that the def't show cause, on Wednesday, 3d April, '72, at 11 a. m., why the report of M. M. Cohen, U. S. com'r, herein filed on 22d instant, should not be approved and made the judgment of this court on the grounds filed.

Exceptions.—Filed Ap'l 3d, 1872.

United States circuit court.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON. } No. 6078.

In the rule taken by the plaintiff, defendant in error, on the 23d day of March, 1872, against this defendant, plaintiff in error, to show cause on the 3d day of April, 1872, why the report of M. M. Cohen,
100 commissioner in chancery, made and filed in this case, since the allowance of the writ of error, should not be confirmed, the defendant shows as follows, viz:

1st. That, by the allowance of a writ of error in this case, with a supersedeas, this hon. court is deprived of all jurisdiction over the case, until the said writ of error shall be disposed of by the Supreme Court of the United States.

2d. That this suit is on the law side of the court, and there is no law authorizing the reference of a plain action at law to a commissioner in chancery or to United States commissioner for decision as to any part of the plaintiff's demand in a petitory action.

3d. In the event said objections are overruled, and not otherwise, defendant further shows that the said report in itself is erroneous, in assuming in the event said plaintiff Bondurant should finally be decreed the owner of the land in controversy that interest on the cost of the property in dispute should be calculated in order to ascertain the supposed damages, and in holding the value of the wood cut after the same should have received additional value by being cut into cord-wood, and by being hauled to the river as a criterion of damages, and in making
101 no deduction for taxes, and fencing, and clearing, and in disregarding the commercial value of the timber in the woods when cut, and the ordinary rate of rent for similar property, and in assuming arbitrary modes of calculation unknown by our law.

Wherefore defendant prays said report, and all proceedings under it, may be stricken from the record, and the same held as improvidently made and taken.

(Signed) By RACE, FOSTER AND E. T. MERRICK.
(Signed) E. H. DURELL, *Judge.*

Hearing and submission of rule.—Extract of minutes April 3d, 1872.

W. E. BONDURANT
vs.
A. C. WATSON. } No. 6078.

The rule taken by the pl'ff to approve the comm'r's report came up—S. R. and C. L. Walker, for pl'ff; Race, Foster and E. T. Merrick, for def't—and after hearing argument, the court took time to advise.

102 *Second report of United States commissioner.—Filed April 26th, 1872.*

Circuit court of the United States, fifth circuit and district of La.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON. } No. 6078.

To the honorable the judges of the said court:

In pursuance of the order of court on the report herein made by me, commissioner, and herein filed on the 22d day of March, 1872, referring the same back to the commissioner for re-adjustment, and for a statement of the amounts allowed for rent, for interest, and for waste, respectively, I, M. M. Cohen, commissioner, do respectfully again report as follows:

That, as the amount of the rent of the cleared portion only of said tract of land is developed by the evidence, and the amount of rent for the wooded portions cannot accurately be estimated, and as the interest on the value of the tract stands in lieu of rent, the commissioner considers that the amount of loss or damages which the plaintiff has 103 sustained can be the more justly estimated by the amount of interest on the value of the land of which he has been deprived, which value being estimated in the report heretofore made at $6,000, the legal interest on this from the date of the sheriff's sale under which the plaintiff claims, the 1st February, 1868, to date, amount' to $1,271.00, and the amount of waste is the amount of wood cut and carried off, this being the depreciation in its value as woodland, which amount is now and here estimated at $180.00. The amount of total damage is estimated as follows:

Interest, (in lieu of rent,)	$1,271 00
Waste, being the value of the wood cut off	180 00
	$1,451 00

Thus making a total of fourteen hundred and fifty-one dollars, as the amount of damages sustained by the plaintiff, which I report and submit.

Resp'ly submitted.

(Signed) M. M. COHEN, *Commissioner.*
(Signed) E. H. DURELL, *Judge.*

104 *Rule for approval of second report.—Extract from the minutes April 29th, 1872.*

W. E. BONDURANT
vs.
AUG. C. WATSON. } No. 6078.

On motion of Sam'l R. and C. L. Walker, of counsel for plaintiff, and on showing to the court that, in pursuance of the order of this honorable court, M. M. Cohen, esq., commissioner, has filed an amended report on the matter of damages herein—

It is ordered that defendant do show cause, on Friday, the 3d day of

May, 1872, at 11 a. m., why the amended report of Com'r Cohen, herein filed on Saturday, the 27th April, 1872, should not be approved, homologated, and made the judgment of this court.

Service accepted of rule.

(Signed) RACE, FOSTER & E. T. MERRICK.

Order: Report approved.—Extract from the minutes May 3d, 1872.

W. E. BONDURANT
vs. No. 6078.
A. C. WATSON.

The rule taken by pl'ff on 29th ulto., to homologate the amended report was called—S. R. and C. L. Walker, for pl'ff; Race, Foster and E. T. Merrick for def't—when, after hearing argument, it 105 is ordered and decreed that the said report be approved and homologated, and that the plaintiff do recover from the defendant, A. C. Watson, the sum of of fourteen hundred and fifty-one dollars, as damages and costs of suit.

Judgment on rule, from judgment-docket.

Circuit court of the United States, fifth circuit and district of Louisiana
April term, 1872.

NEW ORLEANS, *Friday, May 3d,* 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

W. E. BONDURANT
vs. No. 6078.
A. C. WATSON.

The rule taken by pl't'ff, on 29th ulto., to homologate the amended report was called—S. R. and C. L. Walker, for pl't'ff; Race, Foster and E. T. Merrick, for def't—when, after hearing argument, it is ordered and decreed that the said report be approved and homologated, and that the plaintiff do recover from the defendant, A. C. Watson, the 106 sum of fourteen hundred and fifty-one dollars as damages and costs of suit.

Judgment rendered May 3d, 1872.
Judgment signed May 8th, 1872.
(Signed) E. H. DURELL, *Judge.*

Bill of exceptions of defendant.—Filed May 6th, 1872.

W. E. BONDURANT
vs. Circuit. No. 6078.
AUGUSTUS C. WATSON.

Be it remembered that, after the writ of error in this case from the Supreme Court of the United States had been allowed on bond with a supersedeas, and the writ of error in this case had been lodged with the clerk of this court, the plaintiff took out a copy of the judgment of this court, signed on the 14th day of February, A. D. 1872, in this case, and placed the same before M. M. Cohen, a commissioner of said court, and

thereupon said commission', M. M. Cohen, filed in this hon. court, on the
22nd day of March, 1872, a report signed by him, and marked report 1,
and filed by F. B. Vinot, d'y clerk, which is made a part of this bill of
exception, and identified herewith by my signature; and thereupon
107 said plaintiff caused a rule to show cause why said commissioner's
report should not be confirmed to be served on defendant's counsel, and upon the day fixed, viz., the third day of April, the defendant urged the objections specified in the document filed April third, A. D. 1872, by F. B. Vinot, d'y clerk, and identified herewith by my signature, and made a part hereof; and thereupon the court having taken the matter under advisement, directed said commissioner to make another report upon the damages for the detention of said tract of land by the defendant and subsequently, to wit, on the 25th day of April, A. D. 1872, said M. M. Cohen, commissioner, filed a second [erased: and ex-parte] report made a part thereof, marked report 2, and thereupon plaintiff's counsel took the rule entered on the 29th day of April, 1872, served on defendant's counsel *of* to shew cause, on the 3d day of May, A. D. 1872, why said report should not be confirmed; and thereupon, on said last mentioned day before the court, the defendant urged the following objections to said rule and said report of said commissioner:

The erasure of two words approved.]
F. A. WOOLFLEY,
Clerk.

1st. That, by the allowance of said writ of error with a supersedeas
and lodgment of said writ of errors with the clerk *or* this court,
108 this hon. court is deprived of all jurisdiction over this case, until
said writ of error shall be disposed of by the Supreme Court of
the United States.

2nd. That this suit is on the law side of the court, and there is no law authorizing the reference of this plain petitory action at law to a commissioner in chancery or to an United States commissioner for decision as to any part of the plaintiff's demand.

And in the event said objections are overruled this defendant urges these further objections to said last-mentioned ex-parte report, viz: That said report, instead of tak*en* account of the value of the rents and revenues of said land in controversy upon proof, has, against the provisions of law, assumed an unwarranted value for said tract of land, and has calculated interest thereon in lieu of rents and revenues, and for that said estimate for wood cut is $180, and said commissioner makes no deduction for taxes, clearing, and fencing. But this court being the
opinion that the first writ of error with a supersedeas was improvidently
allowed, and that the parties, by consenting to a decision by the court,
gave the court the right to refer the case to a commissioner, and
109 that, in the absence of proof of any value of the uncultivated
portion of said lands to rent and the proof showing that the cultivated portions ought to rent for from say eighty to one hundred and twenty-five dollars per annum, the court was of the opinion that, for want of sufficient proof, it was equitable and reasonable to allow interest on value of land in place of rents and revenues, and ordered said second report of said commissioner to be confirmed and judgment to be entered thereon. And the defendant then and there excepted said opinion and decree of the court as well as all proceedings before said commissioner, and tendered this bill of exception to the court for signature and allowance, which is done.

(Signed) E. H. DURELL, *Judge*.

Petition for writ of error.—Filed May 11th, 1872.

To the hon. the judges of the circuit court of the United States, for the fifth circuit and district of Louisiana:

The petition of Augustus C. Watson, a citizen of the State of 110 Louisiana, respectfully represent, that he feels himself aggrieved by the final judgment signed by this hon. court, on 8th day of May, instant, in the case of Walter E. Bondurant, a citizen of the State of Mississippi, against this defendant, and he is desirous of taking a writ of error, with a supersedeas.

Wherefore he prays that a writ of error may be allowed him for said judgment against him, returnable to the Supreme Court of the United States, according to law, with a supersedeas, and that his bond which he herewith tenders, may be approved, and the citation in error signed, and for general relief.

(Signed) By RACE, FOSTER AND E. T. MERRICK,
For said Watson.

Order.

It is ordered that a writ of error be allowed said Augustus C. Watson, as prayed for, and, the bond being approved, that said writ operate as a supersedeas.

May 11th, 1872.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed May 11th, 1872.

AUG. C. WATSON, PL'FF IN ERROR,
vs.
WALTER E. BONDURANT, DEF'T.
No. 6078.

111 Know all men by these presents that we, Augustus C. Watson, as principal, John F. Butts, James N. Ogden, and T. S. Barton, as surities, are held and firmly bound unto Walter E. Bondurant in the full and just sum of three thousand dollars, to be paid to the said Walter E. Bondurant, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 11th day of May, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein said Walter E. Bondurant is plaintiff, and said Augustus C. Watson, def't, judgment was rendered against the said Augustus C. Watson, defendant; and the said Augustus C. Watson having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Walter E. 112 Bondurant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Augustus C. Watson shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) A. C. WATSON. [SEAL.]
(Signed) JOHN F. BUTTS. [L. S.]
(Signed) JAMES H. OGDEN. [L. S.]
T. S. BARTON. [L. S.]

Sealed and delivered in the presence of—

Approved.
(Signed) E. H. DURELL, *Judge.*

Agreement.—Filed Aug. 9th, 1872.

W. E. BONDURANT
vs.
AUGUSTUS C. WATSON. } Circuit court. No. 6078.

It is agreed that one transcript shall be used for the two writs of error taken by the said Watson, and no advantage shall be taken 113 on account of there not being seperate records for each writ of error.

(Signed) SAM'L R. AND C. L. WALKER,
Att'ys for Bondurant.
(Signed) RACE, FOSTER AND E. T. MERRICK,
For Watson.

114 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States, for fifth circuit and district of Louisiana, do hereby certify that the foregoing 113 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of W. E. Bondurant vs. Augustus C. Watson, No. 6078 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 26th day of October, A. D. 1872.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 26th day of October, A. D. 1872.

E. H. DURELL, *Judge.*

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you or one of you, between Walter E. Bondurant, a citizen of the State of Mississippi, and Augustus C. Watson, a citizen of the State of Louisiana, a manifest error hath happened, to the great damage of the said Augustus C. Watson, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 17th day of February, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6078. Augustus C. Watson, plaintiff in error, versus Walter E. Bondurant, defendant in error. Writ of error. Filed February 17, '72. F. B. Vinot, d'y cl'k.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or one of you, between Walter E. Bondurant, a citizen of the State of Mississippi, and Augustus C. Watson, a citizen of the State of Louisiana, a manifest error hath happened, to the great damage of the said Augustus C. Watson, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 11th day of May, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6078. Augustus C. Watson, plaintiff in error, versus Walter E. Bondurant, defendant in error. Writ of error. Filed May 11, 1872. F. A. Woolfley, clerk.

117 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Walter E. Bondurant, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Augustus C. Watson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Watson, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this eleventh day of May, in the year of our Lord one thousand eight hundred and seventy-two.

E. H. DURELL, *Judge.*

118 (Indorsed:) United States circuit court. No. 6078. Augustus C. Watson, plaintiff in error, vs. Walter E. Bondurant, defendant in error. Citation.

E. T. Merrick, being first duly sworn, on oath saith he delivered the duplicate of this citation this day to C. F. Walker, esq., one of the attorneys of said Walter E. Bondurant, who is a non-resident, and, as affiant believes, absent from the State.

May 13, A. D. 1872.

E. T. MERRICK.

Sworn to & subscribed before me this 13th May, 1872, at New Orleans, La.

F. A. WOOLFLEY,
U. S. Comm'r.

We acknowledge hereby service upon us of the duplicate of this citation in error, the defendant in error being a resident of Mississippi.

New Orleans, 13th May, 1872.

SAM'L R. & C. L. WALKER,
Counsel for W. E. Bondurant.

119 THE UNITED STATES OF AMERICA,
Eastern District of Louisiana:

The President of the United States to Walter E. Bondurant, a citizen of the State of Mississippi, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Augustus C. Watson, a citizen of Louisiana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Watson, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-first day of February, in the year of our Lord one thousand eight hundred and seventy-two.

E. H. DURELL, *Judge.*

120 (Indorsed:) United States circuit court. No. 6078. Augustus C. Watson, plaintiff in error, vs. Walter E. Bondurant, defendant in error. Citation.

Marshal's return.

Received, Feb. 21, '72, by the U. S. marshal, and, on the 23d day same month and year, served a copy of the within citation in error on Walter E. Bondurant, the within-named plaintiff, by delivering the same to Sam'l R. Walker, his attorney, in person, at his office, No. 61 Camp street, in this city, said Bondurant being absent from the city & State.

New Orleans, February 23, 1872.

S. W. REED,
D'y U. S. Marshal.

On this 23d day of February, 1872, personally appeared before me the subscriber, S. W. Reed, and makes oath that he served a copy of the within citation, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to & subscribed before me.

F. B. VINOT, *D'y-Cl'k.*

(Indorsement on cover:) No. 261. Augustus C. Watson, plaintiff in error, vs. Walter E. Bondurant. Louisiana C. C. U. S. Filed 21st November, 1872.

o

Watson
vs
Bondurant.

Supreme Court of the United States.

No. 251.

AUGUSTUS C. WATSON, PLAINTIFF IN ERROR,

versus

WALTER E. BONDURANT, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a *petitory action* brought by W. E. Bondurant against Watson. The petitory action is, in the main, like a writ of right of the common law, and the plaintiff must recover, if at all, on the *strength of his own*, and not on the weakness of his adversaries' title.

The accessary demand for *fruits and revenues and injury* to the property, (the *omnis causa* of the civilians,) forms a part of the same action and, like the interest on a debt, is governed by the same verdict and judgment as the main action, of which it is an incident.—Winter vs. Zachie, 6 Rob. 468; Bisland vs. Provosty, 14 Ann. 175.

PETITION.

In his petition in the court below, Walter E. Bondurant claims, in substance, that he is the owner of "a certain tract of land in the Parish of Tensas, State of Louisiana, being lot

No. 7, township 11, range 12 east, in the district of land north of Red River, containing about 165 11-100 acres; that the said Watson has, since his ownership on the 1st February, 1868, unlawfully possessed himself of the same land, and has damaged it to the extent of $1200 by cutting off wood, and loss of rent $995 66, and prays for judgment declaring him, said Bondurant, owner, and for judgment for $2190 66 against Watson, with legal interest from judicial demand, and costs, and for general relief. R. p. 1–3.

Bondurant alleges title as follows, viz.:

1st. That he is, by representation through his father, William Bondurant, deceased, heir to one-fourth of his grandfather, Daniel M. Bondurant's, estate.

2d. That his uncles, Albert Bondurant, John Bondurant, and Horace Bondurant, under a decree of the court of October 12, 1852, (R. 8,) bought, on the 4th day of December of the same year, all the property belonging to the estate of said Daniel M. Bondurant, deceased, to effect a partition; that his, said Walter's, share, he being a minor, was $37,118 50, and was to be due on his majority on the fifth day of March, 1862, and that the act contained a mortgage in his favor, with the pact *de non alienando.*

3d. That the said petitioner was, during the year 1862 and from the time he arrived at the age of majority, prevented by *vis major* from reinscribing his mortgage against A., J. and H. Bondurant, until the eighth day of September, 1865, when it was reinscribed.

4th. That on the 30th day of January, 1866, "said petitioner *instituted an action* against his said uncles, Albert, John and Horace Bondurant, for the recovery of the amount of said mortgage, principal and interest, *and obtained judgment* against them, the defendants in said suit, decreeing that the mortgage be made executory, and that the said mortgaged property, including said lot" (claimed in said petition) "be sold to satisfy the same."

5th. That said lot and other lands were seized and sold "after due process of law," and bought by said petitioner, as shown by Document C, (Rec. p. 12,) the price for all being $4478.

ANSWER AND AMENDED ANSWER.

The defence set up by the answer and amendment is—

1st. A general denial of all allegations not expressly admitted in the answer.

2d. Denial of heirship, and that said petitioner was a creditor of said Albert, John and Horace Bondurant; that the property of said Daniel M. Bondurant consisted principally in slaves, there being 154 in number, and that three-fourths of said supposed sum of $37,118 50 consisted in the price of slaves, and the sale thereof was void by the laws and constitution of Louisiana; that the *supposed judgment* relied on by petitioner is *res inter alios acta*, and was rendered without any defence of the said Albert, John and Horace Bondurant, consisted for a large part in the price of persons, was barred by the prescription of four, five and ten years, and is in other respects illegal, informal and void;

3d. That defendant, Watson, by a title *translative of property*, acquired from John Bondurant and wife a tract of land containing about 165 acres of land, now in his, said Watson's, possession, but denies that it is covered by the pretended titles of said petitioner, and avers that said John Bondurant had previously acquired absolute and sole ownership of said land by partition between himself, said Albert and Horace Bondurant;

4th. That the said Watson has been in the open, peaceable, undisturbed and uninterrupted possession of said tract of land in his possession since his said purchase of the same in A. D. 1854, as owner, and that having paid the full value of said property in good faith, he is entitled to be maintained in possession of said property against said plaintiff and all persons whatever;

5th. That said pretended sale of said tract of land by the said sheriff is absolutely null and void, so far as said Watson is concerned: in addition to a want of right, no service of process or notice of seizure and sale were in any manner made upon or given the said Watson; no sufficient description of the property intended to be sold was given, either in the pretended levy or notice thereof, and said proceedings are irregular, illegal and informal, and because the sheriff did not seize nor take into his possession the said tract of land in possession of and claimed by defendant; but the same was and has remained in the absolute and undisturbed possession of this defendant since his said purchase in November, 1854, to the present time;

6th. That said Bondurant's pretended mortgage was not only ineffectual and void and extinguished by reason of want of and failure of a sufficient original contract and consideration to support the same, but also by the defect of and for the want of inscription and timely reinscription in the mortgage records in the proper parish within the *ten* years from the date of the said pretended act creating the same, and that said pretended mortgage ceased to have any force and effect as such, for want of reinscription in the mortgage records, and is barred by said prescription.

The amendment to answer corrects the description in the deed from John Bondurant and wife to Watson.—Record, pages 4 to 6.

By agreement in writing under act of Congress of 1867, jury was waived and the cause was tried by the court.—Record, page 17.

A STATEMENT OF FACTS was found by the Court, and several bills of exception were taken by defendant, which, with other matters, will be made the basis of the assignment of erroas in the proper place.

JUDGMENT.

The judgments rendered in this case, notwithstanding the confidence of the judge *a quo* in their form, appear to defendant's counsel not only erroneous, but *extraordinary, being on the law side of the court.*

The first final judgment was pronounced in court on the 2d day of December, 1871, and signed on the 14th February 1872, by which the judge gave absolute and final judgment against Watson for the principal demand, the tract of land in dispute, followed, also, by this remarkable language, viz.:

"It is further ordered, that it be referred to Commissioner Cohen to ascertain and report on damages sustained by petitioner in consequence of the unlawful detention and use of his property by defendant.

The judgment being absolute and final as to the principal matter, the land, all else being only accessary, no other alternative was left Watson, to protect himself from a writ of possession, but to apply for a writ of error with a supersedeas, which was granted him February 17, 1872. Rec. 33. See Writ filed same day, Record, p. 43; Citation in Error and Service, Record, pages 44 and 45.

After this suit was taken out and filed and citation in error served, Bondurant's counsel, it seems from the record, took out a copy of the judgment and placed the same in the hands of M. M. Cohen. Defendant Watson's counsel declining to appear before Cohen, he reported $1928 20, as due by Watson to W. E. Bondurant, Rec. p. 35, 36.

On the 23d of March, 1872, counsel for Bondurant obtained a rule against Watson to show cause, on the 3d day of April, why *the report of M. M. Cohen, Commissioner*, should not be approved and made the judgment of the court, Rec. p. 36.

Watson opposed the commissioner's report on the grounds—

1st. That by the allowance of the writ of error with a supersedeas the Circuit Court is without jurisdiction.

2d. That this suit is on the law side of the court, and there is no law authorising the reference of a plain action at law to a commissioner in chancery or United States commissioner, for decision as to any part of plaintiff's demand.

3d. That in the event the preceding objections are overruled, rents and revenues at law could not be estimated by a rate of interest on original cost of property, and that to estimate value of trees cut, the cord wood should not be estimated at its value on the bank of the river, and taxes and costs of fencing, etc., should also be deducted.

After the rule had been argued on the above objections and taken under advisement, another rule was taken on the 29th day of April, 1872, to show cause, on Friday, 3d day of May, 1872, why the "*amended report*" of Commissioner Cohen should not be approved, homologated and made the judgment of the court, Rec. p. 38.

The rule taken on the 29th of April was made absolute, and the report homologated on the 3d of May, and signed as a judgment.

It is in these words:

"The rule taken by the plaintiff on the 29th ult., to homologate the amended report was called: S. R. & C. L. Walker, for plaintiff; Race, Foster and E. T. Merrick, for defendant—when, after hearing counsel, it is ordered and decreed, that said report be *approved and homologated*, and that the said plaintiff do recover from the defendant, A. C. Watson, the sum of fourteen hundred and fifty-one dollars, as damages and costs of suit."

These proceedings were also made the subject of a bill of exceptions, and the reports of the commissioners, and the objections on page 37, were identified with the bill of exceptions by the identification of Judge Durell, with his name.

To this last decree a writ of error with a supersedeas was also taken.

By *agreement of counsel on file* (Rec. p. 42,) *one record is to serve for both writs of error*.

The plaintiff's supposed title, on which the judgment of the lower court is based, consists—

First. Of Document A, which purports to be a copy of a judgment on a verdict of a jury for a partition, and the sale of certain property described in a petition in suit No. 534, October 12, 1852. What property was so described, what persons were parties to the suit, or on what issues the case was tried, does not appear, *as no part of the record* No 534, except the judgment, *was offered in evidence*.—Bill of Ex. p. 29.

Second. Document B. Copy of a sheriff's act of sale to Albert, John and Walter Bondurant, of 154 slaves, certain movables, certain real estate, as belonging to the succession of

D. M. Bondurant, for $148,474, one-fourth of the price being payable on the 5th day of March, 1862, when Walter E. Bondurant would become of the age of majority, with interest, a mortgage being retained and the vendees binding themselves by a simple covenant, "not to alienate, deteriorate or encumber said property to the prejudice of said mortgage," which is the pact *de non alienando,* on which defendant in error places, and the judge *a quo* placed so much reliance. (Rec. p. 12-14.)

THIRD. Document C, purporting to be a sheriff's act of sale to Walter E. Bondurant, of a large quantity of land, also purporting to include in its description a tract of land corresponding in number of section, etc., with the one mentioned in John Bondurant's deed to Watson, *except as to quantity,* which is less. P. 11.

FOURTH. Document D, purporting to be *a judgment* in suit No. 1242, (*not* a decree in an executory process) after a hearing of the parties against Albert, John and Horace Bondurant, in favor of defendant in error for $37,118 50, with interest at 7c. per annum, from 4th December, 1862, subject to a credit, and decreeing a sale of several tracts of land, and among others No. 152 lot, No. 7 sec., township No. 11, range 12 east, containing 160 11-100 acres.

FIFTH. Document E H D, purporting to be a copy of the execution issued in the suit No. 1242, W. E. Bondurant vs. Albert Bondurant, No. 1242, *to satisfy a judgment rendered"* in the Thirteenth District Court, 14th of November, 1867, in favor of W. E. Bondurant and against Albert Bondurant, and others, to sell their property, "real and personal rights and credits," and especially all of the real estate described in said Document D.

This FI. FA. or execution has indorsed on it what purports to be (so far as it explains itself) a statement of what some unknown person did towards selling the lands.

NO ONE HAS SIGNED IT, AND IT NOWHERE APPEARS FROM THE INDORSEMENT WHO MADE IT.

The court, in its special finding of the facts, has not found any damages for rents, revenues, etc., claimed in the petition.

Plaintiff in error, on his part, shows that by a partition between the Bondurant brothers, the tract of land in controversy was set off to John Bondurant, with other lands and slaves, on the 12th day of December, A. D. 1853.—Rec. 20, 15th Finding.

Plaintiff in error further shows that he acquired title to the same tract of land on the 30th day of November, A. D. 1854, by *a title translative of property* in due form from John Bondurant and wife, to Watson, (said John Bondurant professing to be sole owner) was conveyed to said Watson, and that his title was duly recorded the same day, (November 30th, 1854,) in the conveyance records in and for said parish of Tensas. The price being $5775, and said Watson being unaware of any mortgage on the property, save so far as the registry was a constructive notice. See 16th Finding, p. 20. Document K K, Rec. pp. 24 to 26.

It is found that Watson has, ever since his purchase, November 30th, 1854, been in the actual, public, peaceable and uninterrupted possession of the tract of land in dispute up to the present time, with the exception of the service of citation in this case on the 18th day of April, 1870, and the prosecution of this suit." 18th Finding, Rec. p. 20.

It is also found (see last paragraph but one on same page 20) that after the "issuing of said writ of execution or *fieri facias*, on the 9th of December, A. D. 1867, the sheriff of said parish of Tensas did not take into his possession the tract of land in dispute under the said writ of execution, nor in any manner interrupt or disturb the possession of said Watson.

The only notice given of the pretended seizure under the said fi. fa., favor of W. E. Bondurant, was an illegal notice addressed to Albert, John and Horace Bondurant, posted on the court-house door of the parish of Tensas, it being alleged that they were absentees. Bill of exception, p. 30, last sentence of page 20, 18th Finding.

The controlling and undisputed facts that the plaintiff in error *was, and continued to be*, and *now is the legal and true owner* of the land in controversy, unless his title has been divested and acquired by the plaintiff, and that such divestiture has been accomplished, *if at all, without any actual seizure of the property or notice to the owner*, said *plaintiff in error*, greatly simplify the case and make intelligible the assignment of error, without further explanation.

The judgments are so manifestly erroneous in a suit on the *law side* of the court, that they might be embraced in the first assignment of error; nevertheless, counsel will confine themselves, as near as may be, to the order in time of raising the law questions, (some of which are decisive of the whole controversy,) as they appear on the record, said questions of law being mainly raised by bills of exception and the special findings of fact by the court, under the agreement.

ASSIGNMENT OF ERRORS.

I. It being conclusively shown, that there was no actual seizure of the property in dispute, in possession of the said Watson, and the unsigned indorsement on the writ of execution being the only return thereon, the court erred in refusing to adopt the following ruling for the decision of the cause, viz.: "that in order to make a valid sale of tangible property on execution in all the parishes of the State of Louisiana, except the parishes of Orleans and Jefferson, there must be an actual seizure of such property by the sheriff under execution," and in having held, on the contrary, "that there being a pact *de non alienando*, in the act of sale to Albert, John and Horace Bondurant, as shown by Document B, the defendant could not question the regularity of the proceedings, and the indorsement on said execution and Document E H D was sufficient, without any actual seizure as against defendant, to divest title;" and also erred in finding that said unsigned indorsement on said execution was a seizure of said property in dispute, and could have any legal effect as against said defendant Watson, unaccompanied as it was by any actual seizure. See Bill of Exception in extenso, pages 21 and 22.

II. It having been shown that said W. E. Bondurant, as well as said Watson, were continuously within the Confederate lines during the war; that the recorder of mortgages was at his post at St. Joseph during the same time, and that the records of the parish were under his control, and that there would not have been the slightest difficulty in getting the recorder's endorsement on the supposed mortgage, "*filed for registry,*" and that if any application had been made to the recorder to have any deed recorded, he would have done it, and that said Bondurant's agent was in Tensas in October, 1862, and made no application to have the instrument reinscribed, and it being also shown that said Watson bought in good faith for value, and without any *actual* notice, by a duly recorded title on the 13th November, 1854, and that the loyal government was extended over all parts of Louisiana in June, 1865, and that it is not pretended that said W. E. Bondurant's pretended mortgage was reinscribed until the 8th day of September, 1865, THE COURT ERRED in refusing, among other things, to make and adopt the following rulings, viz.:

"That if it appeared that the plaintiff failed to apply to the recorder of mortgages in and for said parish of Tensas to reinscribe the pretended mortgage set up by him during the ten years from the date of the first inscription, and it was then, and during all that time, in his power and that of his agents, to make such application, and in the power of such recorder to reinscribe the mortgage; that the said mortgage ceased to operate against the property of the defendant Watson at the end of ten years, and a subsequent reinscription more than two years after the lapse of said ten years could not revive the mortgage to the prejudice of defendant's recorded title;" and also *erred* in refusing to make and adopt this further ruling, viz.:

"That under the law of Louisiana as now settled, the reinscription of a mortgage is essential to maintain its validity after the lapse of ten years; that it is the duty of the party relying upon such mortgage to apply to the proper officer to have the same reinscribed, and that such officer, on refusing to reinscribe, is responsible in damages for a neglect of duty;" and the said COURT FURTHER ERRED, instead of adopting such rulings or either of them, in ruling

"That the war of the rebellion was to be deducted from the period prescribed for the reinscription of mortgages, and making such deduction the reinscription of the act of mortgage on the 8th day of September, 1865, was within the ten years." See Bill, pages 26 to 29; 18th Finding, page 21; Deed K K, pages 24 to 26.

III. The Court also ERRED, under the case stated in the bill of exceptions, among other things, in refusing to notice and adopt the following rulings, viz.:

"1st. That it is essential to the validity of a sheriff's return to a writ of execution, that it should be signed by him or his deputy; and inasmuch as the adjudication conveys title at sheriff's sale, that adjudication must be authenticated by the signature of the sheriff or his deputy.

"2d. That in order to make a valid sale of tangible property, in all the parishes of the State of Louisiana except Orleans and Jefferson, there must be an actual seizure of such property by the sheriff on execution.

"3d. That in order to divest the title of the defendant, notice of seizure upon the Bondurants at least, if not upon him, the defendant, was essential;" and further ERRED IN RULING, on the contrary, viz.: "that inasmuch as the mortgage retained in the act of sale to said Albert, James and Horace Bondurant. of date December 4th, 1852, contained the pact *de non alienando*, the said Augustus C. Watson, in the eye of the law, is not to be considered in possession *quoad* the plaintiff, and it does not matter what irregularities were in the sheriff's proceedings in selling the property, Watson, although in actual possession, cannot avail himself of such defects and irregularities." See Bill of Exception, pages 29, 30.

IV. It having been shown by proof that the only notice of seizure given in the case of Walter E. Bondurant vs. Albert Bondurant et al. was a notice posted on the court-house door, the COURT ERRED IN PERMITTING the plaintiff in the lower court, in order to supply the defect in his title, to give oral proof, viz.: his own oral testimony, to show that John Bondurant was present at the day of sale; that plaintiff below, Walter E. Bondurant, rode to the court-house on the day of sale with John Bondurant, and that John Bondurant was aware of the sale, read the notice of the sale to the said Walter on the day of sale from the newspaper, and read the one posted on the court-house door, because parol or oral proof is inadmissible to supply the want of seizure of real property, and that parties cannot be divested of title and posssession except in accordance with law, made to appear by the proper returns by the proper officer.

See Bill, page 30.

V. **THE COURT ERRED** in rendering the final judgment signed on the 14th day of February, 1872, in the present form, and the same is unwarranted in law and by the facts of the case, as well as in form.

VI. The court below erred in taking cognizance of said cause a second time, as to any part of it, after the prosecution of a writ of error, with a supersedeas in due and legal form.

VII. **THE COURT ERRED** in allowing said case to be handed to a commissioner of the Circuit Court, M. M. Cohen, and in receiving and homologating and confirming his report, and making his last report a second judgment of the court in the case. See Bill of Exception, pages 39, 40; Reports, 35, 38; Second Judgment, p. 39.

ARGUMENT.

It ought to be borne in mind, in the discussion of the questions raised in this case, that in Louisiana there are no covenants running with the land. All covenants are purely personal, and the vendee only becomes possessed of the warranties of the prior vendors, by an express subrogation. Whatever rights the law allows which impairs the absolute and complete title of him whom the law calls owner, are secured by special provisions of law, such as the special provisions in reference to servitudes, leases, mortgages and the like. Such rights exist only in the forms and in the manner allowed by law, and when those forms are complied with, they exist as rights *stricti juris*, which may be enforced against third possessors. Simple covenants, even of warranty, are not enforcible by third persons, except by express transfer, called subrogation. Vanwright vs. Foreman, 1 Martin N. S. 355; Smith vs. Wilson, 11 Rob. 523. How far the pact *de non alienando* is an exception to this general rule will be, with some remarks, submitted in another place.

The first five assignments of error go to the first final judgment rendered on the special finding, viz.: February 14, 1872, (Record, p. 17,) and the first assignment raises the question whether the owner, Watson, could be divested of his title as owner, without an actual seizure of the property by the sheriff?

I. On this question, the law is well settled that an *actual seizure* of land and other tangible property is one of the essential requisites to a valid sale by the sheriff, and nothing but a fanciful view of the pact *de non alienando* could have led the judge of the lower court into the erroneous rulings shown by the bill of exception on page 22, and set forth in the first assignment of errors.

The order of seizure and sale is a relict of the Spanish law, having its existence before the registry laws of 1803 and 1810 were created. It has been preserved for the benefit of creditors by articles 732 to 753 of the Code of Practice. Under the Spanish law, where registry was of little moment, and acts were left with the notaries who passed them, the pact *de non alienando* was allowed, in the *via executiva*, to prevail so far as to relieve the creditor of the ordinary demands (C. P. 68, 69,) on the third possessor and allowed the creditor to serve his notices in the executory process on the original debtor. But this right was always considered *stricti juris*, for the ownership and title of third persons might be affected by it, and hence the courts have always seized upon any reasonable pretext to convert the executory process into the ordinary action, where all parties interested might be cited and heard in conformity to the provision of the constitution of the United States, and of Louisiana by implication, declaring that no person shall be deprived of property without due process of law.

Amendment to Constitution of the United States, art. v; Constitution of Louisiana, art. 10; Gurtie vs. Coquet, 1 Martin N. S. 500 to 504; 8 M. N. S. 96.

Art. 10. Of all the world, the plaintiff in error, who had, fourteen years previously, in good faith paid full value to a man who had, as absolute owner, sold him the tract of land in controversy, was the most interested in knowing the process, (the due process of law,) by which he was to be divested of his property. The sheriff did not even know that any portion of the plantation of Watson was directed to be seized, and much less Watson himself, who was totally ignorant of the proceedings.

We meet the monstrous pretension of the defendant in error, that Watson could be divested of title without any seizure or other formality of law, simply because *his vendor*, in an act which he signed, did not cause the printed covenant not to alienate to be stricken out, with two grounds of defence, viz.:

1st. The third possessor and owner, *even* where there is an *executory process*, and the pact *de non alienando*, cannot be divested of ownership, without the observance of the ordinary formalities; and,

2d. The defendant in error has not the benefit of the executory process on his alleged judgment. His "*judgment*" *purports* to be for a certain sum of money, binding *all the property* of the defendants therein, as well as that mortgaged, which was in their possession, and the pact *de non alienando* is not applicable to the case he presents.

It cannot be disputed that the defendant in error has no title, unless he has acquired the title and ownership of Watson, and that Watson was the most interested of all persons in maintaining his title, and therefore most interested in knowing any proceedings in court tending to divest him of title. Supposing, therefore, that it was simply "the executory process." instead of a judgment as set forth in the petition, which W. E. Bondurant was enforcing, it would be quite apparent that the observance of formalities would greatly tend to convey the information to Watson. For in the first place, notice of the issuance of the order of seizure and sale should have been made on all the Bondurants, if present, or an attorney ad hoc to represent them if absent, five or more days before seizing, according to arts. 735, 737 C. P. John Bondurant might have opportunity to communicate this notice to his vendee.

In the second place, after the proper delay the sheriff must *seize* the property itself and take it into his possession. C. P. 734, 645, 648, 654, 655. The act of taking it out of the possession of the owner, and taking it into the custody of law by the sheriff and appointing a keeper, would almost always suffice to give notice to the owner of the seizure of the property. Lands usually, after the Sheriff has "sequestered" them "in his custody," are placed in charge of a keeper or overseer. C. P. 745, 637. All this has a tendency to give notoriety to the proceedings.

3d. The sheriff must advertise the sale thirty days in the official journal. C. P. (1870) Arts. 669, 670.

4th. The appointment of appraisers according to arts. 671, 674 must be made.

5th. *The making* of the appraisement.

All these may be called essential formalities, because they tend to give notice to defendant, to give notoriety to the contemplated sale, and prevent a sacrifice of the owner's property. In the executory process who is more interested in the observance of these formalities, than he whose property is to be sold? How, then, can it be said that the third possessor and owner has no right to require a seizure by which he might obtain notice, or of an advertisement by which the public might be informed of the sale, or of an appraisement by which his property might be saved from sacrifice under the law of the State? C. P. 676, 680. Yet, the contrary of all this is affirmed by the extraordinary ruling which we have assigned as the first error.

The law in regard to the State as to the observance of forms, is equally applicable to private persons. C. C. 489. "No one can be *divested of his property*, unless for some purpose of public utility, and on consideration of an equitable and previous indemnity, *and in a manner previously prescribed by law*."

"The citizen can only be deprived of his property in two ways—by his own consent, or by a forced alienation under the authority of law. The latter mode of transfering property *derives all its efficacy from a strict observance of the formalities which that law prescribes.* Where these are wanting, there is not the alienation by law which can alone supply the want of consent by the owner." Dilagny vs. Smith, 3 L. R. 421.

All the decisions are in harmony with this principle. So it is held that there can be no valid adverse sale of tangible property *without actual seizure.* C. P. arts. 643, 656, 657, 658.

"The effect of a valid seizure and sale thereunder, only transfers to the purchaser the right of the party in whose hands it was seized." C. P. 690.

Gobeau vs. Nashville Railroad, 6 Rob. 346, 347.
Winn vs. Elgee, 6 Rob. R. 102–103.

Without a previous seizure, purchaser acquires nothing.

Offet vs. Mongeut, 2 La. Ann. 785.
Simpson vs. Allain, 7 Rob. R. 500.
Gaines vs. Merchants' Bank, 4 La. Ann. 369.
Fluker vs. Bullard, 2 La. Ann. 338.
2 Ann. 492.
2 Ann. 910.

There must be actual seizure of tangible property. 19 L. R. 58, 59.

Locket vs Harrell, 6 Ann. 533.
Stockton vs. Downey, 6 Ann. 584.
Succession of H. C. Millaudon, 22 Ann. 12.
Surgi vs. Colmer, 22 Ann. 20.
Course vs. Stafford, 24 Ann. 263.

The case of Budd vs. Stinson, 20 Ann. 573, cited by our adversaries in the lower court, being an exception by statute, proves the rule. In the parishes of Jefferson and Orleans, the statute says, "the registry of the seizure in the mortgage office shall be deemed and considered as *the seizure and pos-*

session by the sheriff of the property therein described, and *it shall be unnecessary to appoint a keeper thereof.*" Acts 1857, page 185.

The special *exemption* of the parishes of Jefferson and Orleans, from the necessity of a seizure and possession by the sheriff, and the establishing another formality in their place demonstrates the general rule as to all the other parishes of the State, that the actual seizure by and consequent possession of the sheriff is essential to a valid sale.

Such, also, seems to be the law of the United States, as to seizures required in proceedings on its behalf.

Pelham vs. Rose, 9 Wal. 103.

Pelham vs. Way, 15 Wal. 201, 202.

In admiralty, where proceedings are in *rem*, seizure of the thing is itself notice. Benedict's Admiralty Practice, No. 365, p. 204, Ed. 1850.

The covenants not to alienate, or the pact *de non alienando*, as commonly called, does not in the least affect the preceding decisions.

It ought, on the contrary, to require, in the executory process against third persons, not parties to the suit, that they be enforced with greater vigor, as the only means of protecting the owner in possession, and the Supreme Court of Louisiana, after an argument by able counsel, *and with a full bench*, *declared* that the pact does not relieve the creditor from observing formalities in making sales. The court says: "We concur with the plaintiff, that the insertion in the act of mortgage of the pact *de non alienando* DOES NOT INVEST the mortgage creditor with the right to disregard the forms of law in making the forced alienation of his debtor's property. * * * The advantage of this clause, is to save the mortgage creditor the necessity of resorting to the delays of the *hypothecary* action. He can proceed to enforce his mortgage directly against his mortgage debtor, without reference to the transferee of that debtor. *But still the transferee* is subrogated *to his vendors' right by virtue* of the purchase, and has sufficient interest in the object of the contract of mortgage *to sue to annul* the sale, if the forms of law have not been complied with by the mortgage creditor of his vendor in making the forced sale."

Villa Palma vs. Abat and Generes, 21 Ann. 11.

Common sense, as well as good law, teaches us the necessity of the decision.

Carter vs. Bull, 3 Dallas, 388.
Harris vs. Hardeman, 14 H. 399.
Hollingsworth vs. Barbour, 4 Peters, 475.

If, in a case where the sheriff has *seized* the property, and delivered possession to the purchaser, the third possessor may, for other informalities, as just shown, sue to recover back, much more may the owner, where there never was any seizure or even notice of seizure, maintain his possession against an action to enforce an illegal sale. He who has a right of action to claim what is due to him, has a right *yet more evident* to use the same cause of action as an exception, in order to preserve his rights." C. P. art. 20. If such exception may be pleaded in an answer, much more may a special denial of plaintiff's pretended facts be pleaded in the same manner.

The case of Nathan et al. vs. Lee, 2 N. S. 32, decided in 1823 under the Spanish law, and relied on by our adversaries in the court below, cannot be regarded as law to the extent of the *dictum* therein contained. The Spanish law having been repealed in 1828, the court, recognizing the fact, limited the a decree against the Bondurants and no one else. The executory process, a proceeding partiality *in rem*, would have been another affair.

It is therefore clear that the ruling in the first assignment of error was erroneous, and that the neglect to seize the property is a fatal defect in the pretended title of the defendant in error.

II. Another essential formality required by our law after seizing property was the service of notice of seizure.

If the plaintiff in error is right in the position that the defendant in error, by asking the benefit of a judgment in an ordinary suit, ought to have made the plaintiff in error (whose title he sought to divest and destroy) a party, then the notice of the seizure should have been served on Watson. If, for argument's sake, it be conceded that the defendant in error might, as against Watson, avail himself of the covenant of the Bondurants not to alienate, then the notice should have been *served* on them. Sheriff's returns may be contradicted in Louisiana, much more an unsigned endorsement *which is really no return at all.* Marvel vs. Manouvrier, 14 Ann. 5.

"The defendant has clearly the right to protect himself if he can do so by showing the invalidity of the title with which he is attacked." Surgi vs. Colmer, 22 Ann. 21.

Want of legal notice of seizure is a ground for declaring a sale null. C. P. arts. 654, 655, 735.

Miss. Fire and Marine Ins. Co. vs. Bank of La., 11 Rob. 53, 54.

This notice must be served on the defendant in execution or his agent, or in his absence a curator *ad hoc*. Ball vs. Crockett, 9 Ann. 293, 294. C. P. 737.

The sheriff must give notice of the seizure to defendant in executioa in writing, annexing a list of the property seized, "*which he shall deliver him in person, or leave at his ordinary residence.*" C. P. 654. There is no provision of law authorizing the posting of such notice on the courthouse door.

The notice of seizure is indispensible to the validity af the sheriff's sale, whether the defendant resides in the parish or not." Lamonanier vs. Meyer, 8 Rob. 152.

"We are of the opinion that the notice of seizure was illegal, and the sale under it consequently confers no title on the defendant."

Lockhart vs. Harrell, 6 Ann. 532, 533.

Miss. Marine and Fire Ins. Co. vs. Bank of La., 11 Rob. 53, 54.

See also Grant & Olden vs. Walden, 6 L. R. 623.

III. The command of the fi. fa. on which defendant in error relies, addressed to the sheriff, was *to make return* in seventy days according to the form prescribed. Acts 1855, p. 477; Ray's Revised Statutes, page 660, sec. 3407

This return the law requires the sheriff to endorse on the writ and *sign*. In the language of article 700, Code of Practice, he "shall deliver or direct to the clerk of the court the original of the writ, on which *he shall endorse a return signed by himself of the* manner in which he has executed it, as directed hereafter." C. P. 700.

The unsigned indorsement of some one on the writ was wanting in its main essential, the signature of the officer; the law speaks for itself.

IV. The court erred in permitting the plaintiff to testify as to what occurred between him and John Bondurant on the day of sale at the courthouse door, "in order to cure the want of notice of seizure in the proceedings under the execution issued in the case of Walter E. Bondurant vs. Albert Bondurant et al". By the way, if it did "not matter *what irregularities were in the sheriff's proceedings in selling the property*," as the judge affirms in the preceding bill of exceptions, the testimony ought to have been rejected for irrelevancy. But the testimony was inadmissible on two grounds, viz.: parol proof is inadmissible to make title to real estate, which is required to be in writing, and *a waiver of notice of seizure under an execution cannot be proven by parol.* C. C. art. 2255.

Lockhart vs. Harrell, 6 Ann. 532, 533.

See Webb vs. Coons, 11 Ann. 253.

C. P. 700. The principle is the same as it respects service of petition and citation. "The Code of Practice, art. 185, makes it the duty of the sheriff to serve copies of petition and citation on the defendant. Proof of this is not a matter *en pais. There can be no evidence of it but the sheriff's return*, unless service be waived by appearance of the party."

Harris vs. Alexander, 1 Rob. 30.

V. The next point we will consider is the ruling of the court that the war is not to be counted in the *peremption* of mortgages, and that the period of the war is to be deducted from the ten years in which mortgages are to be reinscribed, even where the parties were resident within the Confederate lines. It is not necessary to remark that the *peremption* of mortgages and the *prescription* of actions are, in the law of Louisiana, two very different things. The one is the failure of a right, dependent on conditions, for a non-observance of the conditions essential to its existence; the other is a direction to the courts not to enforce obligations which have become stale by the lapse of a certain time, leaving the courts of any other State, if they see fit, to enforce the obligation which does not cease to exist. But the mortgage, which is only permitted by special law to exist, (to the encumbrance of property and in derogation of the great principle that the law of Louisiana favors the keeping of all property *in commercium*,) on the condition of the observance of certain forms, fails and ceases to exist, and is *perempted* by their *non-observance.* The law does not say that the registry of mortgages shall be prescribed after ten years if not *reinscribed.* It says the registry shall have the effect of *maintaining the mortgage* for ten years; of giving a force to the mortgage which shall last, not forever, but *endure ten years.* The express law is, (C. C. art. 3333,) "*The registry* PRESERVES evidence of mortgages and privileges *during ten years*, reckoning from the day of their date: *their effect ceases, even against the contracting parties, if the inscriptions* have not been renewed *before the expiration of this time* in the manner in which they were first made."

"But this rule does not take place with regard to mortgages to which *husbands* are subjected for *dower*, and other claims of *wives* and *tutors* and *curators* towards *minors interdicted* and *absent persons* whose *estates they administer.*"

The law being thus explicit, and the defendant in error claiming that in his case the mortgage has been *continued* more than ten years without reinscription by some power superior to the law of Louisiana which created it with power only to live ten years, it behooves the defendant in error to satisfy this Court, as he seems to have done the court below, that the late civil war had the effect of conferring upon the Confederates in arms against the United States, and upon citizens within the

Confederate lines, rights *inter se* which they would not have had if they had not made the war. And whilst he knows no such supposed rights have ever been enforced by any of the State courts, he hopes that his extraordinary position will be maintained by the courts of the United States. A bare glance at the decisions of the Supreme Court of Louisiana would satisfy any mind that the defendant in error would not have the slightest chance of recovery on the case he proves in the State courts. What remarkable merits does he show why he should have greater rights in the United States courts than any citizen of Louisiana could possibly have in the like case? His absence from home on account of service in the Confederate army is no particular merit, and as to the case itself, it seems while his uncles, by the results of the war, lost all the slaves for whose price he has sued, he succeeded in appropriating to himself all his grandfather's lands for $4478, and holding over his uncles a debt of forty or fifty thousand dollars besides, and now claiming that the little tract of land lying remote from the Bondurant tract and adjoining plantation of plaintiff in error was worth $6000, or $1522 more than he gave for all the lands constituting that great estate! No wonder he relies on a pact which he pretends deprives parties in interest of all knowledge of what is being done to their detriment, and no wonder he is so anxious to escape the force of the Louisiana law, which leaves him without any rights against third persons.

But do the laws of nations sanction in the slightest degree his pretensions and the ruling of the judge that there was no necessity of applying to the recorder to have the act reinscribed, and that, notwithstanding the law of Louisiana, the war *ipso facto extended* the duration of the mortgage as much beyond ten years as the length of the war, without any reinscription?

For such is the ruling of the judge. No matter how easy it was to have the mortgage reinscribed, (as it could have been during all the year A. D. 1862, as well as previous and subsequently, the war extended the time among alien enemies *inter se* beyond their own laws, and there was no necessity that it should be done! The late Franco-German war, if the proposition be true, had the effect of changing the rights of Frenchmen among themselves and Germans among themselves, especially if they should become suitors in the courts of the other nation. But the contrary is true: war does not change civil rights unless the conqueror, by express law or enactment, changes them. While Congress, exercising the rights of war under the law of nations, has provided for the citizens of the loyal States and loyal citizens against the enemies of the United States as to the limitation of actions in special cases, it never has changed the laws affecting the private rights of citizens of the Confederate States *inter se*. On this point, it seems superfluous to cite other authorities than one or two of the cases so authoritatively settled by this high tribunal. See

Abbott vs. Hanger, 6 Wal. 532.

Stewart vs. Kahn, 11 Wal. 493.

As Congress has not changed the law on the subject, the defendant in error must fail in his attempt to extend the time allowed by law to his mortgage by adding the duration of the war, we will see how the case stands by the Louisiana law.

That law says to the mortgagee: Your mortgage shall not affect third persons unless you record it with the recorder of mortgages. C. C. 3250, 3318. If you do not record it, (as it is required to be, (C. C. 3317,) it shall be continued in effect for ten years from its date, (but no longer,) without any other act on your part. If you wish to extend it further than ten years and give it a longer duration, you may do so by reinscribing it before the expiration of the ten years, but in no other way. The policy of the Civil Code has always been to exclude parol proof from affecting titles to real estate, and, except in one or two overruled cases, the law is well settled that the Civil Code means what it so absolutely declares, that the "effect of the mortgages ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time." What this effect is which is declared to cease at the end of ten years, is shown by article 3318. The inscriptions of mortgages *only bind the property of the debtor* when it has been made with regard to immovables in the parish where the property lies." C. C. 3318.

The action of the defendant in error is an action at law, and whatever rights he has are *legal and stricti juris;* for there can be no equity in a case where a party claims to have divested his adversary of his title without notice, for much less than the alleged value of the property. If such pretensions against common right can be maintained, it must be on account of the stringent force of the law itself. We therefore appeal, with entire confidence, to the express law and its interpretation by the Supreme Court of Louisiana in this case. "The erasures," (says the Court,) "by act of *the mortgagee*, would not more effectually have extinguished them," (the mortgages,) "than a probate sale, *or the want of a new inscription for more than ten years*, and when judicial or conventional mortgages are thus extinguished, they should be thus noted by the recorder, and no longer be included in his certificates." Gravier's Curator vs. Hodge, 14 L. R. 104.

"The registry and inscription of a mortgage cannot be questioned." "It *ceases*, until reinscribed, to exist as a mortgage against the *mortgagor*, although, up to that time, it did exist, even without inscription." Kohn vs. McHatton, 20 Ann. 224.

The omission to *reinscribe* a mortgage on the books of the register of mortgages within ten years from the date of the first inscription may be opposed by the *parties themselves* or by any *third person* having an adverse interest, *although charged with notice.*"

Minor vs. Alexander, 6 Rob. 170, 171.

C. C. 3366.

"Neither the bankruptcy of a debtor nor the *institution of the hypothecary action* within ten years from the recording of the mortgage *dispensed from reinscription.*"

Shepherd vs. Cotton Press, 2 Ann. 100.

Hyatt vs. Gallier, 6 Ann. 321.

Therefore, the bringing of a suit to enforce the mortgage, even by the hypothecary action as above, with service of petition setting forth the claim at large, and a citation, the most solemn form of giving notice, is not the equivalent of *reinscription*, and this has been the settled jurisprudence of Louisiana under the Code.

See, also, Britton & Koonts vs. Janney, 21 Ann. 204.

Harrang vs. Plattsmeyer, 21 Ann. 427.

Young vs. City Bank, 9 Ann. 193.

Succession of Henry Flower, 12 Ann. 216.

We have already said that the law in relation to the extension of mortgages by reinscription is quite different from the rules regulating the prescription of actions, as the case decided in 1847 shows. 2 A. 100. As the article 3250 C. C. already cited, says: "the mortgage only takes place in such instances as are authorized by law,"' or, as in the French text of the same article, "mortgages take place only in the cases and following the forms of law." See French side of the Code.

The nature of this right, which is permitted to exist under certain conditions, is shown by articles 3245 to 3252, from which it will be seen that the mortgagee simply acquires a right to apply to a court of justice to sell the mortgaged property according to the forms of law, to pay the debt. He cannot take possession of it himself nor touch it, unless he shall become the purchaser. And this right lasts, as we have abundantly shown, only ten years, unless the mortgage be reinscribed *within the ten years*.

The question, then, is a question whether the mortgagee has complied with the forms of law necessary to maintain his right ten years longer, as much so as it is with the holder of a promissory note against the endorser, whether he has done the necessary acts to charge the endorser. They are both acts to be done before similar officers, and the loss, in either case, is not the same as the statute of limitation. The holder suffers the delay to expire before he protests the note; the mortgagee suffers ten years to elapse before he reinscribes, the right to pursue the endorser, or third possessor of the land is perempted, not prescribed.

And it is so considered in France, although the French Code is much less stringent on the question of registry of mortgages than ours.

By our Code, the registry preserves the *evidence* of *mortgages* and *privileges* only during ten years *Their* effect, viz.: the effect of the mortgage or privileges, ceases even against the contracting parties, if the inscriptions have not been renewed. L. C. art. 3333.

Art. 2154 of the French Code is in these words: "The inscriptions preserve the mortgage and privilege during ten years counting from their date. Their effect ceases if the inscriptions have not been renewed before the expiration of the delay." Although this provision of law is much less rigorous towards the creditor than our code, it is construed very much as our code reads.

Rogon says, under art. 2154, "the reinscription has been required, because, if the inscription had lasted as long as the action, which, interrupted by *minority* and *citations* in court, could be indefinitely prolonged, it would become impossible for the register of mortgages to find it in a multitude of records which he would be obliged always to keep in order to give a certificate of mortgages."

So, Troplong cites a case as an example.

"Mr. Lecannus created a rent charge in favor of Madame Dumont, secured by a mortgage. Madame Dumont registered her mortgage March 2d, 1812. On the 20th of August, a sale was made of the mortgaged property to Madame Bournissien, who had her title recorded on the 1st of September. On the 28th January, 1815, Madame Dumont transfered her recorded right to Mr. Capron. This last reinscribed his mortgage several days after the expiration of ten years, viz.: 25th March, 1822. Madame Bournissien contended that the reinscription having been made after the *peremption* of the inscription, the mortgage ceased, in respect to her, to encumber the property. Judgment was rendered in conformity to her view. On appeal, the court of Rouen (February 1st, 1825,) confirmed the decree." * * * *

"It might be objected that Madame Bournissien had received the real estate charged with a registered mortgage at the time of the recording of her title; that the mortgage having been impressed on the land and the right of mortgage having been preserved at the time of the registry of the act of sale, the *peremption* of the inscription ought only to occasion a loss in the rank of the mortgage, but ought not to affect the right of enforcing the mortgage. But the reply seems to me to be sufficient, that the right of enforcing the mortgage was subordinate to the registry, which preserved it, and when it became *dead*, it had necessarily drawn after it the right of enforcing the mortgage which was bound to its fortune and its existence. The question has been decided a second time the same way, by a decree of the court of cassation, (15th December, 1829,) in the case where Mr. Wisher, (registered on the fifteenth of the recording of the sale,) had only renewed the registry of his mortgage after it had already been perempted." Trop. des Priviléges et Hypothèques, No. 716 (*bis.*)

"But let us take care that we proceed according to the spirit of the law regarding the effect of registry, and not of the hypothecary right in itself. The *inscription* not renewed in the delay fixed by the law, ceases to have effect, as our article (2154 French Code) says: it is *perempted*, and moreover, it cannot avail the creditor any more than if it never had existence." Paul Pont. Hypothèque, No. 1035. The foregoing quotations show that the French courts view the law as the Louisiana code has so authoritatively declared it to be, even releasing the mortgagor from the mortgage.

Minor vs. Alexander, 6 Rob. 170, 171.

The bill of exception (Record, p. 26 to 28,) shows that there was no *vis major*, and a party who never applied to the recorder, (who was at his office) to endorse "filed for registry," [Revised Statutes 1855, page 448, section 14,] and reinscribe the act, requires something more than speculative opinions to establish his theory as a fact. So long as there was a recorder at his post having power to comply with the law, which required him to *keep a register* of conventional mortgages, Civil Code, 3351, and hence, if one should be full or become useless, to provide another; also to enter the title of the acts, with dates; also in another register as well as to indorse the filing for registry on the acts; and so long as the law made the recorder, who gives bond and security, responsible for all damages for *non-performance* of duty, (see act 1865, page 140; Civil Code, 3355, 3357,) the mortgagee who has made no further attempt to register the mortgage, than to enquire in a remote city, in another State, if it could be done, and rests contented with the statement of some one in that city, fails entirely of any proof of a *vis major* which relieves him (if vis major relieves in any case, which is not necessary to consider,) from the sole condition upon which the law consents to extend his mortgage ten years longer.

Kohn vs. McHatton, 20 Ann. 224.

Britton & Kountz vs. Normant, 20 Ann. 509.

If the fault of the failure to reinscribe within ten years be that of the register who has removed the records so that reinscription cannot take place, he is liable to mortgagee for the loss of the mortgage. But this *vis major* does not re-establish the mortgage, nor prevent its loss.

Succession of Lowrey, 22 Ann. 205.

This last case is in many respects similar to the one before the court. The mortgage records were removed *to the swamps and to another parish*, and *the mortgage office was closed*. In the case at bar, the mortgage office was open, the records were under the recorder's control, and the recorder was able to make the statutory indorsement on the act, and even record it in the old or new books, which it was his duty to provide at his peril, in the event the old ones could not be had, and he was at all times present with *that official knowledge and discretion* entrusted him by law, to answer respecting mortgages and make certificates, if required. C. C. 3328.

In Rochereau vs. Dupasseur, 22 Ann. 402, there was an attempt to obtain a permit to go to the Parish of St. Charles to reinscribe the mortgage.

When the party arrived, the courthouse was locked. Two attempts were made to have the mortgage reinscribed. This was held not sufficient to extend the mortgage for the next ten years.

As the Louisiana conventional mortgage primarily exists only *ten years, and ceases, or dies,* by express law, at the end of that time, even against *the mortgagor,* unless reinscribed within the ten years, [C. C. 3333,] the Louisiana courts could do no less than follow the law and hold, as they do, that *knowledge of the mortgage does not dispense with* REINSCRIPTION. 22 Ann. 402. THE LAW, THUS SETTLED AND SO POSITIVE, IS A RULE OF PROPERTY, which ought to be the same, we think, on the law side of the courts of the United States as in the State courts. These decisions, and a view of the positive provision of article 3333, C. C., show why the civilians see no analogy between the *peremption* of a mortgage and the *prescription* of debts.

As knowledge of the mortgage has nothing to do with the necessity for its reinscription, there is therefore nothing in the pretense that Watson knew of the mortgage because he waived the certificate, for it is not applicable to the case of reinscription.

Moreover, the bill of exception shows that Watson, who was called as a witness by Bondurant, negatives and rebuts the supposed presumption, which, by the way, was never applied to any case where the CERTIFICATE *waived, would not have shown existence of the registry of the mortgage*, and therefore, that the party was bound by the registry anyhow. It was only a little stronger mode of stating the case, adopted by the judge in rendering the opinion, and has no application, as just said, to the present case.

It is therefore too clear for a denial, that by the express law of Louisiana, as administered by the courts of the State, *as a rule of real property*, that W. E. Bondurant *had no mortgage against the lands of Watson* when he sued his uncles, although a reinscription after twelve or thirteen years might operate as a *new mortgage* against them as his debtors.

VI. The judgment signed February 14, 1872, [Record, p. 17,] is also erroneous, on two grounds, viz.:

The suit is an action at law, and the facts found did not warrant the judgment rendered; and,

Neither the law of the land, the act of Congress, nor the Constitution of the United States authorized the judge, in a plain action at law, to refer the case to a commissioner to ascertain damages, as was sought to be done in this case.

We have already remarked, and cited authorities to show, that the claim for rents, and revenues, and damages is but a part, an incident of the petitory action, and is governed by the same prescription as the action itself. Hence, a judgment on the main action is *res judicata upon the incidents*, which are merged in the judgment on the main action. In the language of civilians, the demand is consumed by the *contestatio litis* and judgment. There is no such thing known to the laws of Louisiana as a separate action for *mesne profits*. They must be returned with the thing to the owner who claims the same.—C. C. 494.

Also, the amount which can be recovered, and the time for which recovery can be had, depend upon the proof of good or bad faith proven in the action.

The facts found, under the act of Congress, control the judgment pronounced on them, in the same manner that a special verdict does in a jury case.

Looking to the finding of the facts in the place of a special verdict, it is clear that Watson became sole owner of the land in dispute by *title translative of property* and duly recorded on the 30th day of November, 1854. *His title* was therefore notice to all the world. See 16th Finding, Record, 20.

W. E. Bondurant deemed it his interest, in order to obtain a heavy judgment against his uncles, which would have the effect of the thing adjudged against them, to bring an ordinary suit instead, [of the executory process,] and that he issued an ordinary execution thereon.—See 5th and 6th Findings, pages 18, 19.

It also appears from the findings, that Watson was no party to the suit; no seizure of the property in dispute was ever made, and no notice ever given him of the pretended seizure and sale. See Record, page 20, 18th Finding.

The mortgage was not continued by reinscription within the ten years, and although W. E. Bondurant's agent was in the parish of Tensas in October, 1862, she did not make the slightest effort to have the mortgage reinscribed, and it never was reinscribed until the 8th day of September, 1865, nearly thirteen years after its first inscription.

The finding is—

"*Both plaintiff and defendant were in the Confederate lines during the late war*, and both were, during a portion of the time, in the Confederate service."

"The plaintiff, while in Virginia in October, A. D. 1862, requested his mother to have the mortgage in his favor reinscribed. On her arrival in Vicksburg, Mississippi, on the 10th of October, 1862, being told that the records of Tensas parish were removed from St. Joseph and secreted, she made no further effort to have the mortgage reinscribed. She was *personally present* in the parish of Tensas in October, A. D. 1862, and no person applied to the recorder of the parish of Tensas to reinscribe said special mortgage in favor of the plaintiff during the period of the war, viz.: 1861, 1862, 1863, 1864, and until the 8th day of September, 1865, on which last mentioned day the said mortgage was, for the first time, reinscribed on the mortgage record."—Record, page 21, 17th Finding.

If we therefore take the findings as they stand under the erroneous rulings of the Court, they by no means authorize a judgment against Watson for the land.

The mortgage had lived out its life of ten years, and for want of a compliance with the condition upon which alone it could be extended, it had ceased to exist, and it could not be renewed against Watson, who was not the debtor of W. E. Bondurant, without his consent. Watson's recorded title *as owner* was therefore perfect, and unaffected by any reinscription as a new mortgage against *the Bondurants*, who were not owners of the land in dispute. To affect the land now by a reinscription as a new mortgage, it must of course be recorded against the owner—against Watson, and this could not be lawfully done without *his* consent, because he was no party to the act, and the recorder could not add his name to it without committing forgery.

It is therefore clear, beyond controversy, under the positive provisions of article 3333 Civil Code, and the authorities already cited under the number V of the argument, which we will not now repeat, that said Bondurant had no mortgage on Watson's land at the time he obtained his judgment against his uncles.

Again: Having resorted to the ordinary action in order to recover judgment against his uncles, he could not divest Watson's title without making him a party to his suit, or bringing an hypothecary action against him. The written law of Louisiana has made no provision for depriving third persons and owners of their property by judgment, without giving them an opportunity to be heard. The *action* must be *against the third possessor.* C. P. art. 68. It must ordinarily be preceded by a demand. C. P. 69. The third possessor may defend himself by showing the want of registry, or other plea. C. C. 3366. Or he may, in certain cases, compel the discussion [the sale] of other property. C. C. 3366, 3367; C. P. 71–73.

Had *Watson* been a party to the suit in the State court, Bondurant could not have obtained a recognition of his dead mortgage against Watson's property, much less have obtained a judgment under the State jurisprudence for the price of the slaves, to be enforced as such mortgage.

Palmer vs. Marston, 14 Wal. 10, 11.

It was only by the inequitable proceedings, *without citation, or notice or seizure*, that he expected to secure Watson's lands. A less greedy young man might have compromised with his uncles, instead of driving them to despair and bankruptcy, [through the hopelessness of paying even $18,750, with interest,] and therefore leaving them without interest to defend the suit. But had he made Watson a party to the suit, the latter would have had an interest to defend the same, to defeat the port, he finds no pact in it in his favor any more than in that from John Bondurant to Watson, and there is no basis for W. E. Bondurant's inequitable and extraordinary pretensions in either. Every one ought also to know that the acts of the *vendor of property*, done or omitted *after the sale* and *registry* of the act of sale, cannot prejudice the vendee's rights which have been previously acquired.

Again: No rents, revenues or damages were found in this case in favor of the plaintiff. The act of Congress contemplates that the judgment will follow the special finding of the court. The judgment, then, could only have been for nominal damages, or none at all. If the singular position were to be conceded that the case could have been referred *to a master in chancery* to ascertain and report damages *in a suit at law*, in this case it could not be done, because the finding of the court was conclusive, and there was no *finding of facts* on which the reference could be made. The judgment follows the verdict. It seems needless to say the law entrusts only two classes of persons to find *issues of fact in actions at law, viz: juries*, and on the waiver in writing by the parties of the jury, by the court; and it will be sufficient to make the point that the court *erred in the case in referring it to "Commissioner Cohen to ascertain and report on the damages sustained by the petitioner in consequence of the unlawful detention and use of his property by defendant."* No argument is needed, nor citation of authority, to establish a proposition which every common law lawyer and judge must see at a glance is true.

VII. Before considering the eighth and last point in this argument, it will be proper to consider the effect of the writ of error and supersedeas on the judgment of 14th of February. 1872.

We have already shown that the petitory action for the land is the main action, and that the claim for rents, damages, etc., is but an incident, and that the verdict or special finding ought to conclude the principal demand and its incidents. When, therefore, a final judgment had been rendered for the main demand and a writ of possession could have issued on the judgment, and the defendant could have been turned out of possession, he had no remedy but to apply for a writ of error with a supersedeas. The judgment decided the *right* in controversy, and was already within the principle established in Forgay vs. Conrad, 6 Howard, 201.

In the language of the Court in Dean vs. Thompson, "So far as the court below is concerned, the decree in this case determined the principal matter in controversy between the parties. And since the decree could not be changed except through a new and distinct proceeding, it determined the matter finally." * * * * *

"It is quite clear that the appeal under consideration is within this rule. The decree from which it was taken *decided the right to the property* in contest—decided it to be delivered by defendant to complainant by transfer, entitled the complainant to have the decree carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership."

The writ of error was issued in a proper case, and the supersedeas must, of necessity, have its usual and legal effect.

VIII. The effect of the writ of error with a supersedeas was to deprive the Circuit Court of all jurisdiction over the case, either to issue or enforce execution or to modify or diminish the judgment already rendered in any respect.

mortgage, and had he, by any possiblity, and against the well settled law of Louisiana, failed in that, he would still have had an opportunity of making the mortgaged property bring its value, which it was not possible for it to do unless the forms of law were complied with. *For no one will bid the full value* for property where the title is imperfect either for want of due formality and want of seizure and notice, or from any other cause.

It is unnecessary to recapitulate the authorities on this point.

The finding also shows a want of seizure or notice, so that if Bondurant had had a mortgage, and had obtained a judgment thereon against Watson, he would not have divested his title, for want of an actual seizure and a lawful notice. The findings on these points, after showing Watson's undisturbed possession, are as follows, viz.:

" That after the issuing of said execution or fieri facias on the ninth day of December, A. D. 1867, the sheriff of said parish of Tensas *did not take into his possession the tract of land in dispute under said writ of execution, nor in any manner interrupt or disturb the possession of said Watson.*"

" *The only notice given of the seizure under the said fieri facias to any one, was a notice addressed* to the defendants, Albert Bondurant, John Bondurant and Horace Bondurant, *posted on the courthouse* door of the Parish of Tensas, they being absent. But on the day of sale, John Bondurant read the notice of sale in a newspaper and conversed with the plaintiff [W. E. Bondurant] about the sale, and was present at the sale."

These essential requisites, seizure and notice of seizure, [had all other proceedings been regular,] being wanting, there could have been no divestiture of Watson's title.

It is useless to consider whether *John Bondurant*, on this finding, would be concluded by his presence at the sale. The question is, the divestiture of Watson's title as owner, and its acquisition by W. E. Bondurant as owner.

The law says you cannot take property on execution without *actual seisure*, and that you cannot make a sale on execution without serving a notice of such actual seizure on the defendants, in person or at their domiciles. If they are absent, a curator *ad hoc* must be appointed, and service made on him. To get over this difficulty, defendant in error says the sheriff's sales to his three uncles contained the pact *de non alienando*, and therefore he had a right to consider them as owners. We have shown the fallacy of this position in the ordinary action, but on his own ground it is a failure, because then no notice would be sufficient to divest title except one served *on all the Bondurants*, which is not pretended; and John Bondurant's presence at the sale could not have had the effect of divesting their title. And nothing except the most rigorous observance of forms could be held to divest the title of a stranger *without notice*. But if it be said that John Bondurant's presence at the sale was sufficient, because he had been the sole owner and had sold to Watson, then W. E. Bondurant abandons the supposed joint ownerships of his three uncles, Albert, John and Horace, recognizes the necessity of looking beyond the sheriff's sale to discover the true owner and third possessor, and when he concedes John Bondurant's ownership, on his own fallacious argument he is forced to the ordinary hypothecary action against the third possessor prescribed by the law; for the mortgage on which he relies is insufficient for his own purposes, and he is forced to sustain himself on the ground that John Bondurant was once sole owner. If he makes that title a part of his sup-

The court therefore erred, in permitting the defendant in error to hand a copy of the judgment to M. M. Cohen *to carry the same into effect by the action of Commissioner Cohen*, and in pronouncing *a second judgment* in the case after such supersedeas. See Bill of Exception, Rec. pages 39, 40.

Had the Judge of the Circuit Court paid sufficient attention to the fact that *the writ of error* operating a supersedeas, when issued, is, in theory and by its *teste*, a process of this high Court, and returnable to this and no other court, and that this Court and no other has jurisdiction to determine its validity and to dismiss or sustain it, he would not have decided "that the *first writ of error with a supersedeas was improvidently allowed*," (Rec. page 40,) but would have left it to this tribunal to determine the validity and propriety of its own writs. He should have recognized the *fact*, whatever might have been his private opinion, that the writ of error with a supersedeas *had* issued from this Court, and that the effect of the proceeding, while pending, was to oust him of all jurisdiction over the case, either to enforce, execute or modify his judgment.

It seems quite clear to the counsel for the plaintiff in error, that all proceedings in the court below subsequent to the first writ of error were *coram non judice*, and ought to be considered void. But the second judgment placed the plaintiff in error in this predicament: The Circuit Court supposed it had jurisdiction to refer the case to a commissioner and confirm his report, and *it had power* to enforce its decree unless a second writ of error, with another supersedeas, should issue. The extraordinary rulings of the Circuit Court left the plaintiff in error no other remedy, in order to protect himself, but to take out the second writ of error and supersedeas.

And by agreement of counsel, as already stated, both writs of error are to be disposed of on one record, and no advantage is to be taken on that account. See agreement, page 42.

The whole case is therefore presented to the court to pronouce such judgment here as shall protect plaintiff in error from both judgments of the lower court in this case.

If the lower court had not been deprived of jurisdiction by the supersedeas, and if the court had had the right, in a plain action at law, to appoint a commissioner to report on a question of damages for the detention and use of the property, and had Bondurant acquired title in February, 1868, as he pretends, the report of the commissioner would have, even then, been clearly erroneous. For Watson, being a possessor in good faith, made the rents and revenues his own until service of citation April 18th, 1870, (Record, p. 4,) and should not have been charged with four years' revenues, as was done by the commissioner. C. C. 494, 495, 3414, 3447, 3448.

A man whose property is taken from him, and whose title is divested without his consent and knowledge, cannot become a possessor in bad faith, and obliged to account for revenues, until cited.

Again: The land in dispute is mostly wild land. Wild lands in Louisiana are often benefitted by cutting off the wood, and when wood is of value, the proprietor recovers only for the value of the standing timber, and not for the manufactured article.

Yarborough vs. Nettles, 7 Ann. 116.

The commissioner ought not, therefore, in the event assumed, to have charged but fifty cents per cord; $40 instead of $180 for the wood cut.

Again: The *law* of Louisiana, (and this case is one of law,) does not admit of the *substitution of interest* and the supposed value of the land, for the rents and revenues issuing from the same, nor for any prospective value which the party may consider his timber to have. Yarborough, in the case just cited, had a saw mill, and he considered the timber of his contiguous lands, which he intended for an annual supply, of greater value to him than the market price. Yet the court held that there was but one way to estimate the loss, and that was the present market value of the timber in the wood.

Interest in Louisiana is a civil fruit, which is only produced by and allowed on *money* or movable things. C. C. 1929, 2895.

Fruits of immovables are recoverable by the owner, and where there is no agreement to pay rent, there are not, strictly speaking, any civil fruits; yet the owner recovers what the property would rent for, and not interest on what the property cost, or on what any one might be disposed to give for the property for purposes of future speculation. C. C. 456, 457, 537, 538, 540, 541. C. P. 7. *The defendant in error, knowing this law, claimed nothing more in his petition than the value* of the timber and the rent of the property.

IV. In conclusion: A review of the various rulings of the Court in this simple action at law can hardly be equalled for their novelty by anything found in modern jurisprudence, and they are perhaps only equalled by the monstrous pretensions of the defendant in error, that a man's right of property may be divested and taken from him, and acquired by another, without citation, notice, or the observance of the forms of law!

Yet, he would have the Court see, in the large judgment which he obtained against his uncles, and which it would seem was left by them undefended through despair, and in the acqui-

sition of the large landed estate of his grandfather, and the acquisition of the land in controversy, all for the sum of $4478, when the latter, he alleges, is worth $6,000—an equity which relieves him from the observance of law, and gives him rights which the courts of the State would never concede to one of its citizens.

GEO. W. RACE,
E. T. MERRICK,
Attorneys and Counsel for Plaintiff in Error.

APPENDIX.

CERTIFICATE OF CUSTODIAN OF PUBLIC RECORDS.

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans.

I hereby certify that I am legal custodian of the records of all notaries public of the city of New Orleans who have died or who have ceased to hold office, andI am also a notary public doing a large business, and that my experience in conveyancing extends back to 1856; and from my experience, I can say that nearly all sales of real estate made on time and mortgages in the above city and parish contain the *pact de non alienando*, and such pact would be inserted by the notary as a matter of course, unless contrary instructions were given.

New Orleans, La., 5 Dec., 1873.

[seal.] signed: ANDREW HERO, JR.

MORTGAGE OFFICE.

This is to certify, that nearly all notarial acts of mortgage sent to this office to be recorded contain the clause of *non alienando*. The pact, however, is not recorded in our office, and my knowledge comes from a casual examination of the acts brought to be recorded.

[seal.] C. DORICAULT, Dy.
H. J. HERRON,
Recorder of Mortgages.

OFFICE OF REGISTER OF CONVEYANCES,
Parish of Orleans, La.

I, the undersigned, register of conveyances in and for the Parish of Orleans, State of Louisiana, do hereby certify, that nearly all of the notarial acts of sale of real estate made on time in this parish, which are brought to this office to be registered, contain the pact *de non alienando;* but as we only register an extract, or synopsis, of the original act of sale, the pact de non alienando does not appear upon the record.

New Orleans, La., December 5th. 1873.

W. R. FISK,
Register.

[Seal.]

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Watson

vs

Bondurant

vs

~~Watson~~

Supreme Court of the United States.

AUGUSTUS C. WATSON, Plaintiff in Error,

versus

WALTER E. BONDURANT, Defendant in Error,

REPLY TO DEFENDANT'S BRIEF AND ARGUMENT.

I. It will be proper to call the attention of the court to some *inaccuracies* in the *quotations* made by the defendant in error. We are at a loss to account for so many of them, although the most careful cannot always avoid errors, and although some of them seem to be but a substitution of other words for the author's words, and some of the authorities prove the reverse of that for which they are cited.

For example: On page 4, the defendant in error cites as a quotation: " Omission and mistakes in a sheriff 's *return* does not affect the purchaser's title."

Hughes vs. Harrison, 7 N. S. 228.

The language used in that case by the court is, the " *deed* adds no force to the effect of the adjudication; consequently, the omissions of the sheriff *in the deed* do not affect the title of the bidder." The error is quite material, for the *deed* adds nothing to the title.

So, again, on the same page of defendant's brief, is this sentence purporting to be a quotation:

"The sheriff's deed makes full proof."

"C. P. 695, etc."

The article reads: "Art. 695. This act of sale adds nothing to the force and effect of the adjudication, but is only intended to afford the proof of it."

"Consequently, if the sheriff has omitted any of the formalities above described," [viz.: the formalities required to be observed *in the deed*—see arts. 691, 692, 693 snd 694,] "the adjudication shall not be void on that account, *if it otherwise appear that it*" [the adjudication] "*was made by virtue of a legal authority, and with all the forms requisite for its validity.*"

The term "adjudication" means the sale or the public announcement made by the sheriff or auctioneer from the stand, that so and so is the purchaser, and the text really proves the contrary of that for which it was cited. It [the deed] adds nothing to the sale, which depends upon the observance of the *forms requisite for its* [the sale's] *validity.*

The next supposed quotation, on same page, is this:

"The proceedings in executory process are summary, and *require no citation.* C. P. 98, 732, 733, 734, 735."

The article 98 Code of Practice is very different from the above. It divides proceedings into three kinds, and defines them to be the ordinary, the executory and the summary. It says the executory order is obtained without *previous* citation. So, also, art. C. P. 734. But the ex parte order is followed by a *notice* in the nature of a citation, which, according to the

Louisiana mode of counting, is equivalent to five days' notice *previous* to a seizure. C. P. 735, 180, last clause. See, also, 736.

But as the defendant in error *did not* proceed by the executory process, but chose to *merge* his demand in a judgment having the force of the thing adjudged against his debtors, and giving no force to auything beyond the matters embraced in his decree, and as that decree makes no allusion to the pact *de non alienando*, had the law been as the erroneous citation reads, it would have been of no avail to the defendant in error.

So, also, the case of Villa Palma vs. Abat & Generes, 21 Ann. 11, on same page, proves directly the reverse of the quotation as applied to the case at bar.

Without tracing out the other inaccuracies of the quotations, and regretting that so many mistakes have been made, as they tend to throw a doubt upon what should always be guarded with some care, we shall, for the present, content ourselves by saying that after the most careful review of the defendant's authorities, we have seen nothing which makes us doubt the entire accuracy of the positions which we have assumed in our original brief.

And of those points, every one has been *directly* adjudicated by the Supreme Court of Louisiana, except two, and therefore are settled law. Of the two, where we find no adjudication in point, one is an express provision of statutory law, that the sheriff shall sign his return, (C. P. 700,) and the other is, whether in the *via ordinaria*, a party can have the benefit of the pact *de non alienando* so as to proceed against the property (in rem) without giving the third possessor the two notices of thirty and ten days required by the Code of Practice previous to bringing suit, and without making the third possessor a party, or declaring in the judgment that the plaintiff should have the benefit of the pact.

On this point we think the authorities show that such will be the decision whenever the point is made and brought befcre the State courts for adjudication.

We had something analogous in former times with the tacit mortgage of the wife or minor, become major. The practice was always in the decree against the husband, or tutor, to declare that the minor or wife had a mortgage for so much, *to take effect from such a date*, [the date when the tutor was appointed, or the property or the money of the wife was used.] Otherwise, the mortgage having become merged in the judgment, it was thought could not affect third parties, except from the date of the judgment. For the orignal debt and mortgage were *merged* in the judgment.

See McKee vs. Cairnes, 2 N. S. 601–603.
Oakey vs. Murphy, 1 An. 272.
Succession of Gilmore, 12 Ann. 565.
Dennistoun vs. Payne, 7 Ann. 334, already cited.
Chinn vs, Hamilton, Hemstead, 438.
Woodworth vs. Spofford, 2 McLain, 168.
Sedan vs. Williams, 4 McLain, 51.

So, in Stafford vs. Stafford, not yet reported, it was held that if the wife omitted any of her claims against her husband in obtaining a judgment of separation of property against him, the omitted claims were barred.

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The executory process, it may be remarked, if the forms of law be observed, would be more calculated to bring home knowledge to the owner than the ordinary action; and hence the necessity of the rule, all parties in interest must be made parties to the suit, for in the ordinary action the mortgagor's attention is first directed to the defence of the suit, which may continue for months, and even years; but in the executory process with the pact, before any seizure can be made, a notice must be served on the mortgagor, that unless the debt be paid the property therein described will be seized and sold. The first impulse of the mortgagor, if he be not in collusion with the mortgagee, will be to hand the notice to the owner whose property is *really* to be seized.

However the court may think on this subject, the other grounds resting on positive law, and the uiform decisions of the court, are in no manner affected by it.

But we cannot believe that the effect given by the *courts* (against articles 68 and 69 of the Code of Practice,) to an old Spanish custom, will be extended so as to allow it to be invoked against common right in the ordinary action.

II. Under the point (so well settled) as to the necessity of actual seizure, in order to make a valid adverse sale, we quote from a recent decision, viz.:

"It has been frequently decided that a sheriff's sale without a valid seizure conveys no title. 11 Ann. 761; 12 Ann. 275; 19 Ann. 58; 22 Ann. 207; 23 Ann. 512.

Case vs. Stafford, 24 Ann. 263.

The defendant in error hopes to escape from the force of the authorities cited on this point, on page 19 of our original argument and brief, by a *dictum* or two in cases of *executory process*, which he has culled out of a long line of decisions, and which were made in reference to some trifling objections set up to sheriff's sales where the essential formalities had been complied with.

The main one is, the country case (decided at Natchitoches) of Smith vs. Logan, 21 Ann. 577. It was a case where the property was *seized* and *sold* and the purchaser put in possession, and afterwards a party who had purchased the property brought suit to set aside the sale, on the ground *that the description in the mortgage* was insufficient; and the court decided that it was sufficient. Had there been any *radical informality* like the want of seizure, or want of notice, or the like, it would have doubtless been seized upon by counsel. But after disposing of the main question, the Supreme Court brush away the quibbles as to some formalities, that did not even attract any attention of the court, with these words:

"As to the informalities, *if any,* in the foreclosure, they cannot avail the plaintiff. He was without interest to arrest the executory proceedings by setting up defenses personal to the defendant in execution. The formalities in forced sales are for the protection of the defendant in execution, and not that of third parties to the proceeding."

That the judge who was the organ of the court did not mean any more than we have said, will appear from his language in another case, argued by able counsel *and decided at New Orleans,* a place more convenient for research; a case also relied on by our adversaries, (viz.:)

"We concur with the plaintiff, that the insertion in the act of mortgage of the pact *de non alienando does not invest* the mortgage creditor *with the right to disregard the forms of law* in making the forced alienation of his mortgage debtor's property."

"We think the non alienation clause springs *from the agree-*

ment of the parties, and not from a probibitory law based upon motives of public policy forbidding the transfer of property so mortgaged. The advantage of this clause is to save the mortgage creditor the necessity of resorting to the delays of the hypothecary action. He can proceed to enforce his mortgage directly against his mortgage debter, without reference to the transferee of that debtor. But *still the transferee is subrogated to his vendor's right* by virtue of the purchase, and *has sufficient interest in the object of the contract of mortgage to sue* to annul the *sale, if the forms of law have not been complied with* by the mortgage creditor of his vendor in making the forced sale." 21 Ann. 11 and 12.

As conveyances in some of the parishes, as well as in New Orleans, are only recorded by extracts describing the land and giving the price or terms of sale between the parties, and as mortgages are recorded in the same manner, omitting the pact *de non alienando* altogether, an examination of the mortgage and other records does not inform the owner or second mortgagee of the mine which may be suddenly sprung to the destruction of his rights; for supposing the advertisement of sale to be as full as the seizure, was [illegible] what information would an advertisement of "160 11-100 acres in same township and range," (Record, page 23,) viz.: township 11, range 12, east, without any reference to metes or bounds, convey to the owner, [illegible] the fact that his property was advertised to be sold, even if he should casually see it.

If the dictum cited from Smith vs. Logan could be understood in any other way than that intended by the court, nothing would be easier, than to despoil the owner or subsequent mortgagee by collusion or even by the indifference of the mortgagor, who should fail to give notice to the owner.

What is surprising is, that it should have been deemed necessary for the Court to say, ao elaborately as was done in the preceding extract, what ought to be obvious to every legal mind; for the only positive way, even under the executory process, with the *pact de non alienando*, by which the owner can have notice, is by the rigid observance of the essential forms of law.

Let Equity speak:—

"A decree obtained without making parties to the suit in which it was had those whose rights are affected thereby, is *fraudulent and void* as to those parties; and even a purchaser under it having notice is not protected by such decree, for otherwise, a decree of a court of equity might be used as an engine for the purpose of effecting the grossest fraud." Cooper's Equity Pleading, p. 97. See, also, 8 Atk. 811; Rep. Temp. Tal. 201: Redesd. Tr. Ch. Pl. 84.

III.

The defendant in error supposes that, notwithstanding the special provision of the Constitution of the United States in regard to the trial by jury; that the reference by the Court to a commissioner might be justified under a provision of the Code of Practice authorizing the appointment of experts and auditors. Code of Practice, 442, 443.

To say nothing of the qualification of a city lawyer to decide upon cord wood in a remote parish as an expert, it is apparent, from article 443, that the auditors there spoken of are to be appointed in cases which would fall under equity jurisdiction in the United States courts.

And in the State courts, where proper to be appointed, they are to be chosen by the parties: "*each party shall name one* and a third shall be appointed by the Court to act as umpire, in case the two should not agree." Code of Practice, 446.

Roper vs. Magee, 11 Ann. 61.

It is therefore clear, under the State practice, that a judge could not have legally appointed an auditor in that manner. But as Congress has declared how these issues of fact are to be tried at law, it leaves the judge without power to devise other means.

IV.

The fact that the pact *de non alienando* (at least in the Parish of Orleans and some other large parishes,) *is not recorded, and that the purchaser has no means of learning its existence* at the office of the register of conveyances or register of mortgages, is also a circumstance worthy of consideration. See the certficates annexed to the original brief and argument of plaintiff in error, not as evidence, but in order that this court may see this branch of the case from the same stand point, that any competent juror, lawyer or judge in Louisiana would, in this or any other matter of daily observation.

Were a judge to hear for the first time from witness, such common words as "*pieux,*" or "*rattoons,*" or "*begasse,*" or to "commence rolling," we suppose it would be proper for him to enquire from any competent person their meaning, and so as to any of the ordinary modes of business or proceedings, peculiar to Louisiana, not common to the other States.

V.

As it respects the quotation from 13 Ann. 242, Smith vs. Nettles, Travis was half owner, and possessed *totum in toto, et totum in qualibet parte*, and the expression used by the court, meant no more than is conceded, viz: that by the Louisiana law as settled by the courts, if you take the *executory process*, and have the pact de non alienando, you may proceed directly against the original mortgagor *provided you observe the forms of law.*

But if you merge or novate your mortgage, by taking a judgment in a suit in the ordinary way, you have not so extensive a right. Compare the case of the Succession of Jesse C. Patrick, 25 Ann. 155, with McCalop vs. Fluker's Heirs, 12 Ann. 551.

The case of Robinson et al. vs Haynes et al., 19 Ann 132, is another of the numerous cases cited by the defendant in error. The question in that case was as to the regularity of the proceeding, etc., it being an action to have a mortgage declared null for want of reinscription. We observed, the court says on page 133, "this is not declared by law to be a cause of nullity. Indeed, article 3333 C. C. recognized the right of reinscription, after the lapse of years, which is inconsistent with the quality of nullity."

"*Inscription ceases to be evidence of a mortgage* after thelapse of ten years and is not subject to the rules of prescription, but it can be removed by the act of the creditor. 2 Ann. 109."

The exact meaning of Mr. Justice Howell, as organ of the court, in the above expression, will become manifest in the extract which, in another place, we shall give from the opinion of the court, through the same organ, in the case of Rochereau vs Dupasseur, 22 Ann. 403.

VI.

As it respects the question whether the first judgment was a final judgment in the sense of the act of of Congress, it may be remarked that it was a *judgment* at law *on the main subject* *in controversy* rendered *in the form prescribed in the act of Congres* 1865, decreeing the ownership of real estate, and it *admitted of an immediate execution, or writ of possession,* and on the main controversy was beyond the control of the court which had rendered it. C. P. art. 548; see also C. P. 630–632.

It seems to us that both writs of error are well taken, and that a party must have a remedy, where he is deprived of his land by a final decree, and need not wait until he is turned out of possession. See Ray vs. Law, 3 Cranch, 179.

Wilson vs. Daniel, 3 Dallas, 404.
Whitney vs. Bank U. S. 13 Peters, 15.
Bronson vs. Railroad, 2 Black, 531.
Forgay vs. Conard, 6 Howard, 203.
Orchard vs. Hughes, 1 Wal. 76.
Thomson vs. Dean, 7 Wal. 342.

See also, Wheeler vs. Harris, 15 Wal. 51, cited by defendant in error.

VII.

On the subject of prescription of mortgages, we have shown in another place, that the law of peremption of mortgages and prescription of actions are different things, and that if article 3333 of the Civil Code could, against all authority, be held to be a prescription, it would not avail defendant in error; for the minor's rights are expressly treated of in the article, but the point has been expressly decided adversely. *Qui dicit de uno, negat de alterio.*

But to prevent any misapprehension as to the finding of the judge as to the sessions of the courts in the parish of Tensas, during the war, we will remark that all the officers of the parish, viz,: clerk, sheriff and recorder, "were mostly at their posts during the war," (Bill of Exception at the foot of page 26,) and nothing prevented the commencement of suits and service of citation. If courts were not held, it was because there was no litigation. Perhaps if Bondurant had sued, a court would have been held to try his case.

And so it was as to other business. No one wished to sell, for there was not any too much confidence in the depreciated Confederate money. No one wished to borrow money on mortgage, for every one had as much of that currency as they wanted, and all were glad to lend on the personal security of anybody.

And it does not appear that at the close of the war there was any activity in any of the offices arising from deferred business, as would have been the case if any considerable business had been transacted, but not perfected as to formalities during the war.

VIII.

The defendant in error desires to assimilate the peremption of a mortgage to the prescription of an action, and says, that if the ten years mentioned in article 3333 C. C. is to be considered as a prescriptive term, then he will show that it does not run against minors.

Unfortunately for his argument, the article cited expressly includes minors and perempts all their mortgages except those against their tutors, and there was a special reason for this exemption, for at that time the minor had a mortgage against his *tutor* without recording, and the tutorship might continue twenty years. The article, after declaring the law in rigorous terms, makes the following exception:

" But this rule does not take place with regard to mortgages to which *husbands* are subject for dower, and other claims of *wives*, and *tutors* and *curators*, towards *minors interdicted* and *absent persons whose estates they administer.*" Therefore, the wife's mortgage against all other persons but her husband, the minor's mortgage against all other persons but his tutor, and the lunatic's mortgage against every other persons but the curator must be reinscribed. The law-giver has treated of the precise matter and expressly shown what he means, and he binds the minor by his general enactment, except in one case only, to-wit: When the minor has a mortgage against the tutor for his administration of the minor's estate. And by no canon of construction can the courts add another exception to the law. *This point was decided many years ago, in the case of Roche's Heirs vs. Groysilliers,* 13 L. R. 245, 246.

In this last mentioned case, the point was expressly made that reinscription was not necessary, because the mortgage was against the *surety* of the *curator ad bona* of minors,(a person performing the functions of a tutor to a minor over (fourteen years of age under the former law,) and it was pointedly decided that it was necessary.

And *as the bringing of an hypothecary action* against the third possessor does not relieve the mortgagee from the necessity of re-inscription during the pendency of litigation, and as the reinscription *after* ten years, with or without suit, makes it *a new mortgage* against the original debtors, (the mortgagors) it is quite clear that the peremption of a mortgage is not a prescription of it; for the bringing of a suit interrupts the prescription of an action, and after a debt on a mortgage is once barred by prescription, the creditor alone cannot receive it. Thus it is said: "If the *prescription* of the mortgage had been intended, (by Art. 3333,) it would have been so expressed."

2 Ann. 113.

IX.

The defendant in error, on the question of reinscription, places much reliance on some expressions of this Court, in the case of Patterson vs. De La Ronde, 8 Wallace.

That decision is doubtless correct, viewed with reference to the Louisiana law and decisions, for two reasons, viz.:

FIRST. The property had been sold by the marshal in 1866 before the Hoa mortgage had become perempted, (otherwise the Hoa mortgage would not have figured in the certificate of mortgages,) and the controversy then concerned a *fund*, and reinscription became useless, for the marshal's sale extinguished the mortgage, and it was his duty to release it. C. P. 708; 1 Ann. 10--16.

Succession of Dejan, 8 Ann. p. 506.

Succession of Ynogoso, 13 Ann. 559.

SECOND. The covenants of Paterson, in his deed to pay the Hoa mortgage, bound him to fulfil his engagements.

We do not, therefore, think any expression of the court on that occasion, and on that state of facts, ought to be construed so as to unsettle titles in Louisiana in other cases, or to interrupt the uniform current of decisions of the courts on the clear expressions of art. 3333 of the Civil Code.

Bonduraut's mortgage was recorded in 1852. That was a constructive notice to all the world, Watson included.

When Watson bought of John Bondurant, having entire confidence in the man and that the title was free, he waived the certificate of mortgage, and paid the money. Now, because a judge casually said, the waiver of the certificate of mortgage where the mortgage was recorded, was equivalent to a notice of it. The defendant in error contends that although the proof is, as the bill of exception shows, that *Watson did not actually* know of the mortgage, it must be held contrary to the fact that he is really chargeable with notice, and then, under the dictum in the above case, that having constructive notice, the mortgage existed against him, notwithstanding the article 3333!

As we have said elsewhere on this point as the waiver of the certificate of mortgages by the purchaser in the act of sale could not render him cognizable of mortgages which were not recorded, so the very common waiver of the formality of the certificate of mortgages and the consequent saving of expense and delay thereby, (where parties have confidence in the vendor,) can imply no more than that he is chargeable all the same with this constructive notice.

An unguarded expression on a collateral matter of a judge of a court, on which the burden of deciding from five to eight hundred cases a year, on the facts as well as law, is imposed, must not be taken as settling the law. As that Court says, *look at what we do*, in order to know the law accurately, and not to a single expression which one of us may have used in pronouncing the decree.

The Supreme Court of Louisiana, we therefore venture to assert, never made the foolish decision that a waiver of the certificate of mortgage by the purchaser, was more than constructive notice of the mortgages actually recorded.

It is not therefore necessary to examine what was said in the Patterson case, which was really a case dealing with an equitable question, and with facts entirely different from those (under the strict law) involved in this case.

At law, it is clear that the article 3333 of the Civil Code does no more than it says, viz.:

"Their registry *preserves* the evidence of mortgages and privileges, *during* ten years reckoning from their date. Their effect *ceases even against* THE CONTRACTING PARTIES, if the inscriptions have *not been renewed* before the expiration of the time *in the manner* in which they were first made."

Knowledge of the mortgage, therefore, does not relieve a party from the necessity of re-inscription. For the "contracting parties" *are bound to know what they have done,* and yet the old mortgage must be re-inscribed before it can be inforced against the very person who subscribed the mortgages. This having been uniformly held by the Louisiana courts and being a question affecting titles, becomes a part of the statute law. Jackson vs. Chew, 12 Wheaton, 167.

The legislation of Louisiana is so very different from that of the other States, not only as to the nature of the right itself, but also on the necessity of the registry of mortgage, that we will reproduce, in brief extracts, the principal laws on the subject.

"No instrument stipulating a mortgage shall have any effect against third persons, except *from the day* on which the same shall have been *recorded* in the office of the judge of the parish where the hypothecated property is situated; as to the county of Orleans, in the office of the register of mortgages at New Orleans." Act March 24th, 1810; 2 Moreau's Dig., p. 285, sec 4.

* * * * "And all sureties, sales, contracts, judgments, sentences or decrees aforesaid, and all liens of any nature whatever having the effect of a legal mortgage, which shall not be recorded agreeable to the provisions of this act SHALL BE UTTERLY NULL AND VOID TO ALL INTENTS AND PURPOSES, EXCEPT *between the parties thereto.*

Last clause of sec. 1 of act 26, March, 1813. 2 Moreau's Dig. 287.

These acts continued in force and were re-enacted in 1855.

A review of these enactments in connection with article 3333 of the Civil Code, was made by the Supreme Court of Lonisiana, in 1847, in the case of Shepherd vs. Orleans Cotton Press, cited by defendant in error, and we cannot do better than to call the attention of the court to what is said on this subject on pages 110, 111, 112 and 113 of that case (2 Ann. 110 to 113,) and a recital of the legistation, from which it will also appear as we have slsewhere said that the earlier, and later and all the decisions as to theeffect of the art. 3333, are consistent, and the law is settled.

See also Prevost vs. Ellis, 11 Rob. 59, 60. Act 15th March, 1855, No. 274, page 335.

Now when the new art. 3333 of the code of 1825 provided that the registry preserved the evidence of the mortgage during ten years, and if not re-inscribed its effect ceased, even against the contracting parties, it followed in the line of the previous acts, of 1810 and 1813, which were subsequent to the old Code (the Code of 1808.)

And hence, the exceptions expressly made to relieve from its effects show how it was understood by the lawgiver.

Act of 1842, page 232, No. 96, relieved the property banks from its operation.

Act 1853, page 152, No. 193, relieved the Poydras fund from the operation of the article.

Act of 1843, is in these words: Be it enacted, etc. "That article" three thousand three hundred and thirty-three of the Civil Code be so amended, that *it shall be the duty* of the recorder of mortgages and judges performing the like duties *to* *cancel and erase* on the single application in writing to that effect by the *owner*, *creditor* of the owner, or *other party interested*, all inscriptions of mortgages which have existed, or may exist, on their record for a period exceeding ten years, without a renewal of the inscription. Provided, however, this section shall not apply to mortgages against *husbands* for the dotal and other claims of their wives, to mortgages against tutors and curators in favor of minors, interdicted and absent persons, nor to such mortgages in favor of the property banks." Act 1843. No. 87, p. 62.

After a this long series of decisions under legislation, in which it has been uniformly held that a want of re-inscription releases the third possessor with or without knowledge, the legislature, in revising the Civil Code of 1825, has, in the Code of 1870, re-enacted article 3333, in the words of the English text, "the registry *preserves* the *evidence* of mortgages," etc., and the French language is abolished as the medium of preserving or of promulgating the laws.

As the present case simply involves the question whether, after the failure to re-inscribe a mortgage within the ten years, the mortgagee, who neglected to re-inscribe, can inforce his mortgage against a party who bought during the ten years and paid value, simply because in the act of mortgage (he having confidence in the vendor,) waived the certificate of mortgages which, if it had been, produced would have shown that the mortgagee had a mortgage, it is enough for us to show that the neglect to re-inscribe has discharged the incumbrance against said purchaser. And this we have done by abundant authorities. But to prevent all misapprehension, we will state that the authorities referred to in the Patterson case relative to the inscription, (not re-inscription,) of mortgages have been overruled, so that now the long line of early decisions, and the later decisions of the Louisiana courts, under the Code of 1825, are in harmony; and the dissenting opinion of the chief justice in Moore vs. Swan, 14 Ann. 828, which collates the decisions on the subject, is held to be the law. Harrang vs. Plattsmier, 21 Ann. 426.

The law now is, that knowledge of mortgages only provable by parol and not shown by or resulting from some written instruments signed by the party to be charged with such notice, is not the equivalent of registry except, possibly, in cases of gross fraud on the part of such party to be charged with notice.

But, as just said, that is not the question for the consideration of the court in this case. It is what was the effect of the failure to re-inscribe the Bondurant mortgage as to Watson under the law of Louisiana, within ten years. And on this point there has been no conflict of opinion among the judges, and the Louisiana cases cited by the defendant in error, as to the effect of Art. 3333, C. C. as well as those cited by the plaintiff in error, show that such failure to re-inscribe has ever been held to release the property in favor of junior purchasers and mortgagee. Thus:

"The inscription is exclusively in the power of the party having an interest in making it. If he does not re-inscribe, he cannot complain of losses thourgh his own neglect." Shepherd vs. Cotton Press, 2 Ann. 112 and 113, cited by defendant in error.

"The registry of the judgment was clearly not a compliance with the 3333d art. ef the Code, and was not a re-inscription of the mortgage."

" After this case was first taken under consideration, the question which presents itself relative to the *prescription* of mortgages, underwent an elaborate argument in the case of Shepherd vs. The Orleans Cotton Press Company, ante p. 100. We there held that with regard to inscribed mortgages, '*the delay of ten years is in all cases* fatal and if, it be permitted to expire without a re-inscription the mortgage loses its rank; *and that a litigation between the mortgage creditors, does not dispense with this re-inscription.*' We conclude, therefore, that the plaintiff has lost all hypothecary right resulting from the mortgage retained by *Cavens* as regards other creditors, and can only rank as a creditor of *Gibson* with a judicial mortgage to take effect on the 11th May, 1841."

McElrath vs. Dupuy, 2 Ann. 523. See, also,
Hyde vs. Bennett, 2 Ann. 800.
Barelli vs. Delassus, 16 Ann. 283.
Adle vs. Ante, 5 Ann. 634.
Succession of Gremillion, 4 Ann. 412.
Batey vs. Woolfolk, 20 Ann. 388.

"Now, when inscription of his mortgage expired by the lapse of time, the effect of the inscription, that is, the evidence of the mortgage, ceased, not only as to third persons, but the parties to the act C. C. 3333. "Admitting Mrs Bowman to have BEEN A PARTY *to the act, at the end of ten years, it ceased to be evidence against her* of a mortgage upon her husband's property, and all mortgages they having legal existence and vitality upon that property, assumed their position *the same as if Duncan's mortgage had never been created*; consequently Mrs. Bowman's mortgage resumed its legal force and rank, and *the subsequent re-inscription of Duncan's mortgage acquired or operated no greater* *effect than a new contract of mortgage made between the parties on that day.* 2 Ann. 100; 21 Ann. 204."

"To have any effect against her in displacing her mortgage rights, then existing in full force *her consent was necessary.* We know of no law which implies her consent to a renunciation by the re-inscription of the mortgage given by the husband."

Gegan vs. Bowman, 22 Ann. 337.

"But he contends that, as to the plaintiff, *a reinscription* was unnecessary, because, in his act of mortgage, the one under which defendant holds was recited, and plaintiff cannot be considered a third person, but is affected with knowledge, and bound as though he was a party, under articles 3314, 3315, 3316 C. C."

"This point was directly put in the case of Brittin & Koontz vs. Janney, 21 Ann. 204, and decided adversely to the position of the defendant herein. It was" (put) "in these words: 'The reinscription of their mortgage was rendered unnecessary by the inscription of the Shaw mortgage, wherein their note and mortgage were distinctly set forth;' that is, as counsel say in this case, 'by an acknowledgment of defendants' mortgage by plaintiff himself, in an authentic act to which he was a party, and under which he claims his mortgage rights, a reinscription was rendered unnecessary.'

"The Shaw mortgage in the case cited must have contained a recital and acknowledgment of the Britton and Kountz mortgage, to the same purport and effect as that of the plaintiff here. It was held in said case that this did not operate a reinscription of the acknowledged mortgage, nor supply the omission to re-inscribe as the law requires, and for the object intended. Mrs. Shaw, by said recital in her act of mortgage,

Supreme Court of the United States.

No. 261.

AUGUSTUS C. WATSON, Plaintiff in Error,

versus

WALTER E. BONDURANT, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The defendant in error, Walter E. Bondurant, was equal heir with his three uncles, Albert, John and Horace Bondurant, of the property of D. M. Bondurant, of the Parish of Tensas, Louisiana.

In 1852 a partition was sought in the proper court at the suit of John and Horace vs. Albert Bondurant, as tutor of the minor heir. The partition was made by licitation, according to the decree of court; and at the sale Albert, John and Horace Bondurant became the purchasers of all the property of the succession for the sum of $148,474. One-fourth of this sum was due the defendant in error as his share in the succession. By the terms of sale the portion of the price due the minors was made payable March 5, 1862, the date at which the minor would attain the age of majority, with seven per cent. interest to be paid annually, secured by mortgage, containing the pact *de non alienando*, by which the co-heirs, purchasers, bound themselves not to alienate, deteriorate or encumber the said property to to the prejudice of said mortgage. In 1854 the plaintiff in error purchased of John Bondurant the tract of land described in the petition, which is the subject of the original suit. In 1867 the defendant in error obtained judgment against the co-heirs, mortgagors, and under that judgment the defendant in error became the purchaser of all the lands subject to his mortgage. To recover from the possession of Watson, the plaintiff in error, this tract of land alienated by John Bondurant, one of the mortgagors, is the object of the original suit herein.

The mortgage could not have been foreclosed earlier than it was. There was no District Court held in Tensas from November, 1861, until November, 1865. Nor was it possible (if it had been necessary to reinscribe such a mortgage as the one in question,) to have done so at an earlier date than September 8th, 1865, the earliest period practicable after the return of the books of record to their proper office.

POINTS AND AUTHORITIES.

I.

Of the alleged irregularities and omission in the execution of the writ of seizure and sale:

The first of the numerous bills of exceptions to be found at page 21, and the third at page 29 of the printed transcript, relate to alleged informalities and omissions in the execution of the writ of seizure and sale, under which the defendant in error became the purchaser of the tract of land the subject of the original suit.

The rulings of the Circuit Judge were in perfect accordance with the law of Louisiana, as shown by the following authorities.

"Judicial proceedings, before a competent tribunal, will not be treated as nullities for defects of form only, but in cases expressly provided by law, or within the legal intendment of Art. 12 of the Civil Code."

Gibson vs. Foster, 2 A. 503.

A judicial sale at the suit of a mortgage creditor will not be treated as null for informalities, *anterior* to the seizure, except in cases of actual want of citation, nor for informalities *posterior* to it, not involving the violation of a prohibitory law.

Broughton vs. King, 2 A. 569.

"Omissions or mistakes in a sheriff's return does not affect the purchaser's title."

Hughes vs. Harrison, 7 N. S. 228.

"In a sale by a fi fa., the property passes by the adjudication."

Ibid, Code of Practice, 690, 691.

"The sheriff's deed (Transcript p. 11) makes full proof."

C. P. 695; Revised Statutes, Sec. 3398, 1448.

"The proceedings in excutory process are summary and require no citation." C. P. 98, 732, 733, 734, 735.

"As to the informalities in the foreclosures, they cannot avail the plaintiff. He was without interest to arrest the executory proceedings, by setting up defences personal to the defendant in execution. The formalities in forced sales are for the protection of the defendant and not of third parties to the proceedings."

Smith vs. Logan, 21 A. 579.

"Plaintiff acquires the property after the mortgage, from his vendor to the defendant, he is, therefore, presumed to have had notice of the mortgage."

Ibid 578.

"But what right has the defendant, (plaintiff in error,) to complain of this sale of property, which he only held subject to the rights of his vendor's mortgage creditor ?" With the non-alienation clause he could not expect to be made a party to the sale.

Villa Palma vs. Abat & Generes, 21 A. 11.

II.

OF THE PACT DE NON ALIENANDO.

The effect of the pact *de non alienando*, contained in the deed from the sheriff to Albert, John and Horace Bondurant, at pages 12, 13, 14 of Transcript is, that it follows the property to which it is attached in whatever hands it may be found.

C. P. Art. 62, 63.

"Any alienation made in violation of the pact *de non alienando*, is *ipso facto* void as it relates to the creditor."

Nathan vs. Lee, 2 N. S. 32.

"In the comtemplation of law, the whole of the land remained in the possession of the original debtor."

Smith vs. Nettles, 13 A. 242.

"The notice to be given of the seizure of property under execution, is no part of the proceedings, that a purchaser at sheriff's sale is bound to heed or examine. It may be waived by the debtor—it may be waived by the debtor without prejudicing the rights of a purchaser or vitiating his title."

McDonough vs. Garland, 7 A. 143.

The object of the notice is to apprise him of which property the sheriff takes in execution and of which he claims to take possession by virtue of the seizure.

Ibid 7 A. 143.

"The purchaser of property subject to a mortgage with the *pact de non alienando*, is not entitled to notice of an order of seizure and sale, nor to be made a party to the executory proceedings."

1 L. R 39; 13 L. 133; 15 L. 269; 19 L. R. 91; 2 R. 378; 4 R. 389; 6 R. 58; 9 R. 283; 10 R. 54; 2. A. 453; 3 A. 268; 4 A. 324; 21 A. 759; 21 A. 11.

III.

OF THE PRESCRIPTION.

The second bill of exceptions at pages 27, 28, 29, was to the ruling of the Circuit Judge that the reinscription of the act of mortgage on the [illegible]th day of September, 1865, was in time; the period of the war being deducted from the ten years within which reinscription is to be made in order to preserve the existence of registry. The ruling was correct and in accordance with the act of Congress of June the 11th, 1864, discussed by this Court in Stewart vs. Kahn, 13 Wall. 493, 158.

If the ten years as expressed in Art. 3369 of the revised Civil Code (3333 of the old Code) is to be considered as a prescriptive term, then we respectfully show that:

That prescription does not run against minors, except in cases specified by law.

Revised C. C. 3522, 3555.

Prescription does not commence to run against a minor until he has arrived at the age of maturity.

Meyers vs. Bethany, 9 L. 378; Rev. C. C. 3542.

Prescription does not run against a beneficiary heir with respect to the debt due him by the succession.

Rev. C. C. 3526.

Minors are beneficiary heirs by operation of the law.

Rev. C. C. 977.

Prescription does not begin to run until the right of action has accrued.

Gueno vs. Sumastre, 1 A. 44.

Patterson vs. de la Ronde, 8 Wal. 292.

A third possessor is without capacity to plead prescription, it is an exception that a debtor and his creditors alone can plead, and the obligation exists until they avail themselves of it.

King vs. Hickey, 2 A. 367.

IV.

OF THE RE-INSCRIPTION OF THE MORTGAGE.

The debt became exigible and the mortgage executory in 1862, ten years after its date, war then prevailed, no courts were sitting, if the theory of the learned counsel of plaintiff in error be correct, the contract was a legal abortion which fell still-born from the womb of the law. Suppose the minor had been but one year old at the date of the partition could non re-inscription within ten years, have forfeited his inheritance?

But reinscription is not by law required in such cases as this.

"It was a legal or tacit mortgage existing by operation of law.

Revised Civil Code, Art. 3287, § 2.

The act of mortgage being termed a *special* mortgage, as expressed at pages 9 and 10 of Transcript, simply restricted it to the property specified in the act.

Ibid. Art. 3288, 8, 3.

It was succession property. The partition by limitation was not a sale as between the heirs and does not change the nature of the thing to be partaken. The proceeds of real estate represent it and are realty.

Hook vs. Hook, 14 L. 23; 2 A. 411; Rev. C., Art. 1382.

A minor's mortgage was never voidable for want of either inscription or reinscription until the passing of the act of March, 1869, putting in force Art. 123 of the Constitution of 1868.

We conceive that the second paragraph in Art. 3369, Rev. Code expressly excepts minors' mortgages from the rule prescribed in that article.

It is not the mortgage that loses its effect but merely the registry.

Shepherd vs. Cotton Press, 2 A. 100.
Patterson vs. LaRonde, 8. Wal. 292.
Gentes vs. Blasco, 20 A. 403.
Robinson vs. Haynes, 19 A. 132.

But as between Watson and the defendant in error, reinscription was not necessary. As a purchaser of property subject to the *pact de non alienando*, he could claim no greater right than John Bondurant, the mortgagor of the property.

"The vendee cannot claim to be in a better position than his vendor, in contemplation of the law, the whole of the land remained in the possession of the original debtor.

Smith vs Nettles, 13 A. 242.

"The mortgagee in such a case has a right to proceed by the *via executiva,* after the alienation, as if the property still belonged to the mortgagor.

Guesnard vs Soulie, 8 A. 5.

And between the original parties reinscription was not required by law.

"In Shepherd vs. Cotton Press, 2 A. 100 we held that parties to a contract cannot take advantage of the non reinscription of a mortgage it creates or which results from it by operation of law."

Townsend vs. Harrison, 2 A. 174; 2 A. 100.

It is true that Art. 3369, Revised Civil Code, (if it applied to this case, which it does not,) says: "The *registry* preserves the *evidence* of mortgages during ten years, and its effect ceases even against the contracting parties, etc.; but the effect between the contracting parties of non inscription or non registry is, that if a person has given a mortgage on his property and takes advantage of the neglect to register the mortgage, and engages the same property to another person without informing him of the first mortgage, he shall be deemed guilty of fraud and subject to the penalty denounced in Art. 3365 Rev. C. C. This is how the effect ceases between the original parties.

It is not a fraud to mortgage or sell to another if the mortgage is not reinscribed within ten years.

Shepherd vs. Cotton Press, 100, 2 A.
Liddell vs. Rucker; 13 A. 571.

V.

OF THE REFERENCE TO COMMISSIONER COHEN.

The Circuit Judge did not err in referring the ascertainment of the amount of damages to Commissioner Cohen. The law of Louisiana authorizes such proceeding. Code of Practice, Arts 442, 443, being regular under our system, we cannot see why it is not authorized by the Process Act, May 19, 1828, and the [redacted] Practice Act of June 1, 1872.

VI.

OF THE FINALITY OF THE JUDGMENT

Nor was the first judgment rendered a final judgment

Craighead vs. Wilson, 18 How. 201.
Beebe vs. Russel, 19 How. 250.
20 " 290.

The case of Wheeler vs. Harris, 13 Wal. 51, is exactly in point.

It seems to us that a great deal of *ex parte testimony* has been dragged into the transcript of the Record by means of the numerous bills of exceptions therein contained. But we believe the law to be that where a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error except for the wrongful admission or rejection of evidence.

Dirst vs. Morris, 14 Wal. 490.

Such being the law, we believe that the admission or rejection of the evidence exhibited in the bill of exception in the record contained should not vary the result of the case, as decided by the Circuit Judge, upon the merits.

All which is respectfully submitted.

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